FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 15 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 585

ISADORE BLUMENFIELD and MONTE PERKINS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

E. DAVID ROSEN,
310 Biscayne Building,
19 West Flager Street,
Miami, Florida,
THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
MCBRIDE, VON MOSCHZISKER
& BRADLEY,
2015 Land Title Building,
Philadelphia 10, Penna.,
Attorneys for Petitioner Blumenfield.

HENRY H. BANK,
Room 707—512 Nicollet Building,
Minneapolis, Minnesota,
Attorney for Petitioner Perkins.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional, Statutory and Procedural Rules Provisions Involved	2
Statement of the Case	4
1. The Nature of the Proceedings	4
2. Claims Upon Which Proceedings Were Based	4
Reasons for Granting the Writ	6
The Indictments	6
The Trial Judge Refused to Permit Petitioners to Set Up a Legitimate Defense	12
Other Respects in Which the Trial Judge Refused to Listen to the Petitioners' Side of the Case	15
(a) Evidence as to Tollefson's Reasons for Bias Growing Out of Her Relationship to Persons in the Department of Justice	15
(b) Evidence as to Change of Venue	18
The District Court Violated the Rule of Krulewitch v. United States	22
The Evidence Showed No Violation of the Act	23
Special Considerations as to Perkins	23
Conclusion	28
Certificate of Service	28
Appendix A—Opinion Below (All Cases)	1a
Appendix B—Judgment Below (Blumenfield Cases)	18a
Appendix C—Judgment Below (Perkins Case)	19a
Appendix D—Order Below (All Cases)	20a

TABLE OF CASES CITED.

	Page
Alford v. U. S., 282 U. S. 687, 51 S. Ct. 218	12
Bowles v. Goebel, 151 F. 2d 671 (8 Cir.)	18, 19, 22
Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192	23
Cole v. Arkansas, 333 U. S. 196, 68 S. Ct. 514	10
Com. v. Farrell, 187 Pa. 408, 41 Atl. 382	15
DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255	11
Gebardi v. United States, 287 U. S. 112, 53 S. Ct. 35	23
Gordon v. United States, 344 U. S. 414, 73 S. Ct. 369	17
Jones v. United States, 11 F. 2d 98	11
Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716	22
Norcutt v. United States, 65 F. 2d 913	13
Pennsylvania R. R. Co. v. City of Reading, 254 Pa. 110, 98 Atl. 791	20
Pinkerton v. United States, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489	27
Sealfon v. United States, 332 U. S. 575, 68 S. Ct. 237	24, 25
Stirone v. United States, 361 U. S. 212, 80 S. Ct. 270	2, 6, 7, 8, 9, 10
United States v. De Angelo, 138 F. 2d 466 (3rd Cir.)	24, 25
United States v. Falcone, 109 F. 2d 579 (2 Cir.) aff'd 311 U. S. 205, 61 S. Ct. 204	24
United States v. Floyd, 228 F. 2d 913 (7th Cir.)	11
United States v. Hunt, 120 F. 2d 592	11
United States v. Pechenik, 236 F. 2d 844 (3rd Cir.)	26
United States v. Reginelli, 133 F. 2d 595 (3 Cir.)	23
United States v. Riley, 74 Fed. 210, 211 (D. Kentucky)	11
Villaroman v. United States, 184 F. 2d 261 (CA D. C.)	17

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Federal Rules of Criminal Procedure, Rule 21(a)	3
United States Constitution:	
Amendment V	2, 6, 8, 9
Amendment VI	3, 7, 9
White Slave Traffic Act, 18 USC 2422	3
3 Wigmore, Sec. 948, et seq., Third Edition	17
Wigmore, Vol. III, section 961, page 518	15
Wigmore, 3rd Ed., Vol. 5, Sec. 1580, p. 444	20

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

ISADORE BLUMENFIELD AND MONTE PERKINS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit affirming the judgments of the United States District Court for the District of Minnesota, Fourth Division, which had adjudged petitioners guilty of violating the White Slave Traffic Act.

OPINIONS BELOW.

The opinion of the District Court has not yet been reported. It appears at page 138 of the certified transcript of original papers constituting the record on appeal in the United States Court of Appeals for the Eighth Circuit. The opinion of the Court of Appeals has not yet been reported. One copy of it constitutes Appendix A to this petition for a writ of certiorari.

JURISDICTION.

The judgments of the Court of Appeals were entered on November 15, 1960. The jurisdiction of this Court is invoked under 28 USC 1254(1) and Rule 22(2).

QUESTIONS PRESENTED.

1. Does an indictment for violating the White Slave Traffic Act meet constitutional standards and limit jeopardy as required by *Stirone v. United States* if it neither names nor describes the woman transported, although she was known to the prosecution?

2. Was the right of cross-examination denied where the United States District Court refused to permit a defendant to show by cross-examination that it was another man, rather than himself, who had committed the offenses?

3. Was the right of cross-examination denied where the United States District Court refused to permit cross-examination of the principal prosecution witness as to her relationship to persons in the Department of Justice?

4. Was due process denied where the United States District Court refused to receive evidence in support of a motion for transfer to another district?

5. In a conspiracy trial, is it proper to receive against one conspirator evidence that the other conspirator made hearsay declarations as to the first conspirator where the declarations were not made in pursuance of the conspiracy?

6. Can a conviction under the White Slave Traffic Act stand:

(a) Where a customer of a long-time prostitute was convicted of inducing her to travel in interstate commerce for the purpose of having sexual intercourse with him?

(b) Where the evidence is insufficient to support the verdicts?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

2. United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

3. White Slave Traffic Act, 18 USC 2422:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4. Federal Rules of Criminal Procedure, Rule 21(a):

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

STATEMENT OF THE CASE.

1. The Nature of the Proceedings.

Blumenfield appealed from judgments of the United States District Court for the District of Minnesota, Fourth Division, sentencing him to imprisonment for two years and fining him $2,500 on Indictment #71, imposing a like sentence on Indictment #74, and adjudging that the said sentences be served as a single general sentence.

Perkins appealed from the judgment of the same court sentencing him to imprisonment for one year and one day on Indictment #74.

The Court of Appeals for the Eighth Circuit affirmed all three judgments.

2. Claims Upon Which Proceedings Were Based.

Indictment #71, on which Blumenfield was convicted, charged that on or about May 8, 1956 in Minneapolis Blumenfield knowingly persuaded and induced[1] "a woman" (unnamed) to go by common carrier from Chicago, Illinois to Minneapolis, Minnesota for the purpose of prostitution, debauchery, and other immoral practices, and with the intent and purpose that "said woman" engage in the practice of prostitution, debauchery, and other immoral practices and did thereby knowingly cause "said woman" to be transported upon said common carrier (R. 17).

Indictment #71 also charged that Perkins did knowingly aid, abet, counsel, command, induce and procure the commission by Blumenfield of the aforesaid offense. However, the trial judge set aside a verdict by the jury convict-

1. The indictment also charged that the woman was enticed so to go. But the trial judge took that charge away from the jury on all indictments (N. T. p. 933).

ing Perkins of this offense and entered judgment of acquittal as to Perkins thereon.

The jury acquitted both Blumenfield and Perkins on Indictments #70, #72 and #73 which were identical with Indictment #71 (described above) except that the dates averred in them were February 13, 1957, July 14, 1958, and December 24, 1955, respectively. Each of these indictments also referred to an unnamed woman (Transcript of Voir Dire Examination, pp. 5, 6).

Indictment #74, on which both Blumenfield and Perkins were convicted, charged that between September 1, 1954 and September 1, 1958 at Minneapolis, and at divers other places to the grand jury unknown, Blumenfield and Perkins conspired to commit "certain offenses" against the United States in violation of Section 2422, Title 18, United States Code, making it unlawful for any person to knowingly persuade, induce, entice or coerce any woman to go from one place to another in interstate commerce for the purpose of prostitution, debauchery, or for any other immoral purpose, etc., and that said defendants conspired that Blumenfield and Perkins would knowingly persuade, induce and coerce "a woman" (unnamed) to go by airplane from Chicago, Illinois to Minneapolis, Minnesota for such purposes and would thereby knowingly cause "said woman" to be transported as a passenger upon a common carrier (R. 19).

Thirteen overt acts were set forth in the non-charging part of this indictment. They aver that certain things were done in connection with a Tollefson woman in order to carry out the conspiracy to induce transportation of an unnamed woman.

Certain fundamentals about the Government's case should be emphasized without further delay, to wit: (a) the Government does not assert that either defendant was or is a panderer or pimp; (b) the Government asserts that Tollefso was a prostitute, Blumenfield was one of her customers, and Perkins merely aided Blumenfield in inducing

Tollefson to travel; (c) Tollefson's family lived in Minneapolis, she was brought up in Minneapolis, her roots were there; (d) regardless of whether Tollefson's travels were induced by anyone, the travels did not make a prostitute out of her; she testified that she first became a prostitute in Minneapolis in 1953 and that before doing so she had just returned to Minneapolis only for the purpose of attending her sister's wedding (N. T. pp. 33, 37).

REASONS FOR GRANTING THE WRIT.

The prosecution was too anxious to convict Blumenfield. Due to this anxiety, unfairness was piled upon unfairness. Blumfield went down under the sheer weight of compounded fundamental errors, dragging with him Perkins.

The Indictments.

In *Stirone v. United States*, 361 U. S. 212, 80 S. Ct. 270, this Court declared that the very purpose of the Fifth Amendment's requirement that a man be indicted by grand jury was to *limit his jeopardy* to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. In the present case, we ask this Court to declare that this requirement is not met and one's jeopardy is not limited by indictments under the White Slave Traffic Act which refer to "a woman", without naming her or describing her. It seems clear that when a grand jury marks such indictments "True", such action by the grand jury does not *limit the jeopardy* of the defendant to the offense of inducing the transportation of any particular woman. Since the indictment neither names nor describes the woman, the defendant could be tried on that indictment for inducing the transportation of any woman in the world. Indeed, the action of the grand jury in stamping such a bill of indictment "true" does not even indicate whether or not the grand jurors made a prima facie finding against the defendants as to the particular woman whom

the United States Attorney may have had in mind when he started the prosecution. In the present case the United States Attorney claims that he had a woman named Marilyn Tollefson in mind at all times. But the United States Attorney never afforded the grand jury an opportunity to announce that the defendants should be tried in connection with Marilyn Tollefson. For the only bills of indictment which he gave the grand jurors a chance to return or ignore were bills of indictment which neither named Tollefson nor described her.[2] (The conspiracy indictment states that overt acts were committed in connection with Tollefson for the purpose of carrying out the conspiracy to transport an unnamed woman. The implication, if any, is that the unnamed woman was not Tollefson.)

Petitioners urge that such bills of indictment not only run afoul of the Fifth Amendment; they also violate the Sixth Amendment's requirement that the accused be informed of the nature and cause of the accusation. Obviously, the "accusation" referred to in the Sixth Amendment means an accusation properly returned by a grand jury or, in the language of the *Stirone* opinion (361 U. S. 212, 80 S. Ct. 270, 273), an accusation "charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

To quote further from the *Stirone* case, we say that each of these petitioners:

> ". . . was convicted on a charge the grand jury never made against him. This was fatal error. Cf. Cole v. State of Arkansas, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644; DeJonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. Ed. 278." (See 361 U. S. 212, 80 S. Ct. 270, 274.)

---

2. We have no way of knowing whether the grand jury heard from other female witnesses about their travels and who induced them. Counsel for Blumenfield requested this information at page 26 of the transcript of the Proceedings upon the Motions and again by the filing of a formal motion to inspect the grand jury minutes (R. 58). The request and the motion were both denied (Transcript of Proceedings Upon Motions, pp. 27, 28, 245).

The invalidity of the indictments in this respect was raised by both defendants in advance of trial by motions to dismiss (R. 26, 38).

The matter was orally argued at length in advance of trial. See pages 19 et seq. of the Transcript of the Proceedings on Motions. At pages 24-26 of those proceedings, the Assistant United States Attorney orally stated that the "victim" in the case was Tollefson. This gave the defendants notice that Tollefson was the woman about whom the Assistant United States Attorney proposed to question his witnesses at the trial. But the United States Attorney had no power to make an "accusation". His statement did not give the defendants any notice that the grand jury had accused them in connection with Tollefson and this is what the Fifth and Sixth Amendments require. The statement of the Assistant United States Attorney certainly was not equivalent to the finding of true bills by a grand jury accusing the defendants in connection with Tollefson.

To permit defendants to be tried upon the oral charge made against them by the Assistant United States Attorney certainly violated *Stirone v. United States*, quoted *supra*. The oral statement by the Assistant United States Attorney did not even have the dignity of a formal written information and even a formal written information would have been insufficient basis for trial under the Fifth Amendment for the infamous offenses for which both defendants have been sentenced.

At page 27 of the transcript the trial judge said that if it was requested in a motion for a bill of particulars, he would require the United States Attorney to name the woman involved. No such request was made. If such a request had been made, and if the United States Attorney had named the woman in a bill of particulars,[3] the require-

3. In the very first paragraph of his Opinion, the trial judge says that the name of the woman was voluntarily provided in a bill of particulars. We respectfully assert that the trial judge is in error. It was not provided in any bill of particulars.

ment of a prima facie finding by the grand jury accusing defendants with regard to that woman would still not have been met. For she was not named in the accusations which the grand jury returned after making a prima facie finding of their truth. A bill of particulars could not establish what woman the grand jurors had made their finding in regard to. Therefore, a bill of particulars, while it could limit jeopardy, would not limit it to jeopardy of the offense charged in the indictment. A paragraph in a bill of particulars would only have given the defendants the notice, which they already had from the oral statement of the Assistant United States Attorney, that his evidence at the trial was going to be evidence about Tollefson. This cannot be equated with the constitutional mandate that defendants be informed[4] of the cause of the accusation *made by the grand jury*.[5] While a bill of particulars may fill in details it cannot supply an essential element not stated by the indictment.

At page 243 of the transcript of the Proceedings on the Motions, counsel for Blumenfield again[6] requested permission to examine the notes of the grand jury for the exclusive purpose of determining how many women testified before it. In the alternative, counsel offered to take the word of the United States Attorney or an Assistant United States Attorney if he would state of record, without identifying who they were, how many women testified before the grand jury. In this connection counsel cited *Stirone v. United States*, *supra* (244), just as counsel had previously cited it in the same connection at page 27. The Assistant United States Attorney responded that counsel was attempting to secure a witness list (244). The trial judge denied the motion (245).

In the first paragraph of his Opinion (R. 138) the trial judge says that there is not the slightest showing that any

4. As required by the Sixth Amendment.

5. As required by the Fifth Amendment.

6. See footnote 1 at page 4, *supra*.

woman other than Tollefson was under consideration by the grand jury.[7] But this is true only because he ruled it would be improper for us to make such a showing (27, 28, 245). It is submitted that it is an additional violation of due process for the trial judge to rule against us on the ground we have not shown something which he refused to let us show. But this violation of due process, if it be one, is of secondary importance in the present case to the violation of the Fifth and Sixth Amendments which resulted from trial for inducing Tollefson to travel for prostitution purposes when the grand jury[8] had not made any such accusation and, consequently, the defendants had not been informed[9] of such an accusation.

The Court of Appeals speaks of petitioners' position as though it was bottomed upon "difficulty in defending the charge" and a desire not to be put twice in jeopardy (Appendix A, page 4a, *infra*). But those are not our arguments. We argue (a) that "the charge" of transporting Tollefson was never made; and (b) that our jeopardy at the trial was not limited by this indictment to an accusation independently made by a grand jury.

Stirone v. United States, supra, does not stand alone as authority for our position.

In *Cole v. Arkansas*, 333 U. S. 196, 201, 68 S. Ct. 514, 517, Mr. Justice Black delivered the opinion of an unanimous Court and said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised *by that charge*, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal . . ." (Emphasis added.)

---

7. Nor is there any showing the grand jury considered Tollefson in connection with the charges.

8. As required by the Fifth Amendment.

9. As required by the Sixth Amendment.

See *DeJonge v. Oregon*, 299 U. S. 353, 362, 57 St. Ct. 255, 259.

We have not found any case which specifically holds whether or not an indictment under the White Slave Traffic Act must name the woman if, as in this case, her name was known.[10] But we did find that in *United States v. Hunt*, 120 F. 2d 592, 593, 594, the Court of Appeals for the Seventh Circuit upheld indictments under the Act against the charge that they were too vague and not sufficiently particular. In support of its holding, the Court expressly pointed out at page 594, with regard to the indictments:

> "They named . . . the girls or girl involved . . ."

This was in accordance with the rule expressed by the Court of Appeals for the Fourth Circuit when it said in *Jones v. United States*, 11 F. 2d 98, 99:

> ". . . The name or description of an individual other than the defendant may sometimes serve to identify a particular crime which is said to have been committed. If so, the accused is entitled to be told it, if the grand jury knows it, so that he may make ready his defense and be protected against the possibility of double jeopardy . . ."

See *United States v. Floyd*, 228 F. 2d 913, 915 (7th Cir.); *United States v. Riley*, 74 Fed. 210, 211 (D. Kentucky).

For the foregoing reasons we assert that, because of the failure of the indictments to name the woman, defendants were tried for infamous crimes without the grand jury having found a true bill accusing them of those crimes and without defendants having been informed of the accusations against them in accordance with the Constitution.

---

10. Indictments in the Eighth Circuit have sometimes failed to include the women's names, but the failure never seems to have been raised by any defendant or decided by any court. See *Wiley v. United States*, 257 F. 2d 900; *Pulley v. United States*, 253 F. 2d 796; *Rosenfield v. United States*, 216 F. 2d 260.

The Trial Judge Refused to Permit Petitioners to Set Up a Legitimate Defense.

"Cross-examination of a witness is a matter of right" *Alford v. U. S.*, 282 U. S. 687, 690, 51 S. Ct. 218.

It may seem unbelievable, but the Trial Judge in the present case refused clear, direct, and repeated requests by counsel for Blumenfield that he be permitted to ask the prostitute, Tollefson, on cross-examination, whether it was not true that a man named Hy Brodie, *rather than petitioners Blumenfield and Perkins*, was the person who had induced her to travel in interstate commerce for prostitution on the occasions set forth in the indictments.

In accordance with a suggestion by the Trial Judge (N. T. p. 261), defense counsel made an offer of proof as to what they wanted to elicit from Tollefson by cross-examining her about Hy Brodie. The offer of proof as to the cross-examination commences at N. T. p. 303. Defense counsel stated that he wanted to show that Hy Brodie, who operated a Ford Agency in Chicago, was a friend whom Tollefson had mentioned from time to time both in direct examination and in cross-examination; that Hy Brodie had been keeping her during the indictment period and thereafter; that he travelled with her interstate; that he paid bills for her at the time she indicated she was getting money from the defendants; that she was Brodie's mistress during the indictment period (N. T. p. 304); that she "is laying things at the door of the defendant that actually belong in the lap of Mr. Brodie"; that she is trying to protect Brodie; that she had been promised immunity both for herself and for Brodie in connection with her 1957 perjury (N. T. 305); *and that it was Brodie who was actually guilty of what she was charging defendant with* (N. T. pp. 304, 305). Defense counsel expressly stated that he wanted to question Tollefson upon such details of her relationship with Brodie as would affect her action in coming from Chicago to Minneapolis (N. T. p. 306). Defense counsel pointed out that he considered "the true fact with relation to who paid

whom for what" as being of the first importance (N. T. p. 306).

At page 918, of *Norcutt v. United States*, 65 F. 2d 913, the Court of Appeals for the Eighth Circuit said such proof is "always" proper. There was not raised here any collateral issue as to whether Brodie was *also* guilty of doing what Blumenfield was alleged to have done. Instead, counsel offered to prove that it was really Brodie *instead of* Blumenfield who was guilty of the offenses charged in the indictments.[11] The Assistant United States Attorney strenuously objected to this and actually argued that such evidence would not have any direct relationship to the question of inducement by Blumenfield (N. T. p. 307).

The trial judge then ruled that he would permit defense counsel to question Tollefson "in a general way" insofar as having sexual relations with Brodie and having received money from Brodie "from year to year" was concerned *but he would not permit defense counsel to question Tollefson about her travels together with Brodie or to go into any detail as to the various episodes of their relationship* (N. T. pp. 309-311). The trial judge specifically ruled that he would not permit defense counsel to go into travels across the State line with Brodie (N. T. p. 310). Defense counsel stated that they disagreed with the ruling (N. T. p. 310) and Mr. von Moschzisker of defense counsel again asked the trial judge whether he had ruled that the defense would not be permitted to go into the travels. The trial judge responded in the affirmative and then repeated that defense counsel would be allowed to go into the receipt of money (N. T. pp. 310, 311). An exception was noted (N. T. p. 311).

We think it is our duty to state with the greatest respect that clear and palpable error occurred when the trial judge prevented defense counsel from showing that it was Brodie rather than Blumenfield who according to the offer of proof was (N. T. p. 305):

---

11. This would acquit Perkins of conspiracy with Blumenfield, and that is all he has been convicted of.

"actually guilty of the very thing that she is charging against this defendant.

"that she is laying things at the door of the defendant that actually belong in the lap of Mr. Brody."

The trial judge excluded proof of innocence. This violated due process. If a conviction is allowed to stand after such a ruling, it means the barons wasted their time when they took a day off and assembled on the plains of Runnemede.

In his Opinion denying a new trial (R. 138) the trial judge gives no answer to the argument contained in this section of our brief, although the matter had been fully argued before him at trial and after having been assigned as reason for a new trial (R. 124, paragraphs 8, 9; R. 131, paragraphs 8, 9).

The Opinion of the Court of Appeals simply brushes petitioners' argument aside (see pp. 16a, 17a of Appendix A, *infra*) by stating that the limit of cross-examination upon *collateral* matters is a problem to be resolved by judicial discretion. Petitioners agree with that general proposition. But counsel were not raising a collateral issue when they requested permission to ask Tollefson whether it was Brodie instead of the defendants who had done what the prosecution wanted the defendants convicted for doing. Counsel were attempting to raise a complete, non-collateral attack upon the direct evidence of the prosecution.[12]

12. It is no answer to say petitioners should have called Brodie to the witness stand. They were entitled to have Tollefson's testimony on the point also. Indeed, if Tollefson's admission that it was Brodie who was actually guilty would be collateral, then petitioners certainly could no go into it in their case in chief.

Other Respects in Which the Trial Judge Refused to Listen to the Petitioners' Side of the Case.

(a) *Evidence as to Tollefson's Reasons for Bias Growing Out of Her Relationship to Persons in the Department of Justice.*

Suppose that the defense had rested upon one key defense witness. Let us say the witness was a prostitute and that her testimony, if believed, provided the defendants with complete alibis. Suppose then that the Assistant United States Attorney had offered to prove that for a three-week period within the last five months preceding the trial, and in contemplation of trial, the defendants had installed this defense witness in a hotel and had permitted her to believe that huge expenses which she ran up at the hotel for liquor and other entertainment would be paid for by the defense. Suppose further that the Assistant United States Attorney offered to prove at the time of the trial itself "how much she is getting" as well as "how much witness fees she got" (N. T. p. 326). Suppose, finally, that defense counsel objected to the Assistant United States Attorney proving all this and argued that it had no relationship to credibility. We respectfully suggest that the court not only would be obliged to overrule our objection, but in addition, the court would be entirely justified in entertaining the gravest doubts as to our intelligence. Such details of a witness's relationship to the party who calls him are always receivable. Wigmore, Vol. III, section 961, page 518; *Com. v. Farrell*, 187 Pa. 408, 41 Atl. 382.

But in the trial of the present case, when the defense offered to prove every one of the above things about the prosecution witness Tollefson, the trial judge refused to let the defense do so!

This came about in the following fashion.

At N. T. pp. 278, 279, Tollefson testified on cross-examination that she had been at the Duluth Hotel in Du-

luth. She testified that she had testified before the grand jury which indicted defendants before she went to the Duluth Hotel (N. T. p. 319). She testified that at the request of the F. B. I. she had registered at the hotel under a false name. She said it was the F. B. I. who had brought her to the hotel (N. T. pp. 279, 280). At N. T. p. 282 the trial judge stated that he was going to sustain an objection to the Duluth evidence and that counsel might place an offer of proof with regard to it on the record when court adjourned.

The offer of proof commences at N. T. p. 324. At the outset, we point out the fact that at N. T. pp. 329, 330, the trial judge ruled that his action in sustaining the objection to cross-examination equally applied to an affirmative attempt to prove by defense witnesses the matters contained in the offer of proof and that therefore counsel might as well excuse their witnesses, which was done. Therefore, there arises no question here as to whether the evidence was inadmissible during cross-examination, but admissible as part of defense testimony.

The offer was to prove that after testifying before the indicting grand jury, Tollefson had gone to Duluth on September 4, 1959 and registered at the Duluth Hotel as Mrs. R. Severson (N. T. p. 324); that she remained there for twenty days running up a bill in the total amount of $724.48 including "huge bills" for all kinds of whiskey, scotch, bourbon and brandy; that she entertained rather lavishly; that her impression was that the government was going to pay the bill; that she had not paid the bill; that her belief at the very moment when she was on the witness stand was that she had been royally treated by the government and had been permitted to run up the bills (N. T. p. 324). Defense counsel further offered to prove Tollefson's relations with the government and "how much she is getting" as well as how much she had received in witness fees (N. T. p. 326).

The Assistant United States Attorney objected to the entire offer of proof and stated that it had no relationship to her credibility (N. T. p. 326)! The objection was sustained (N. T. pp. 326, 327). An exception was taken (N. T. p. 328).

We submit that the trial judge committed grave error in ruling out the above evidence, particularly since everything at the trial turned on Tollefson's credibility. *Gordon v. United States*, 344 U. S. 414, 73 S. Ct. 369. Relevant and important facts bearing on the trustworthiness of the witness' testimony may not be curtailed. *Gordon v. United States, supra.* It is universally conceded that where the opponent seeks to show bias of a witness either in favor of the proponent or against the opponent such bias may be shown either by cross-examination or extrinsic testimony. The whole question is adequately covered in 3 Wigmore, Sec. 948, et seq., Third Edition. See also *Villaroman v. United States*, 184 F. 2d 261 (CA D. C.).

In his Opinion denying a new trial (R. 138), the trial judge writes as though the Duluth evidence had been presented for the purpose of contradicting *Tollefson*. Then the trial judge points out the familiar rule against impeaching a witness by contradiction as to a collateral matter.[13] But that was not at all what we were trying to do. The defense was attempting to impeach Tollefson by showing that she had a bias and prejudice in favor of the Government, and that is never a collateral matter.

The Opinion of the trial judge also says that there was no contention made that the Government ever agreed to pay Tollefson's hotel bill. But at N. T. pp. 324, 325 the defense had offered to prove that Tollefson had not paid the bill and that her impression was that the Government was going to pay it. Since it was her state of mind that was being probed for the purpose of showing bias, petitioners submit that the important thing was what she

13. The Court of Appeals does likewise, see page 16a of Appendix A, *infra*.

thought the Government was going to do. It is no answer to say that the Government had not as yet done it.

(b) *Evidence as to Change of Venue.*

The present case affords this Court an opportunity to give the lower federal courts as well as Counsel guidance on the ground rules which should be followed when adverse newspaper publicity creates a question of whether it is necessary to transfer a case to another district for trial.

The trial judge decided that evidence, and not just affidavits, should be received on the question of whether Blumenfield's notoriety was such that the trial of both defendants should be transferred to another district. Formal motions for transfer had been made (R. 26, 39).[14] The matter came on for hearing on February 1, 1960 and the transcript commences at page 88 of the Proceedings on Motions. As the Assistant United States Attorney had stated at page 60 when the matter had been discussed on an earlier day:

> ". . . It is a question of whether whatever appeared in the newspapers has prejudiced the public against this defendant . . ."

We agree that the answer to that question was properly for the discretion of the trial judge.

But:

> "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists. Bowles v. Goebel, 151 F. 2d 671, 674 (8 Cir.) . . ."

In the present case, after having decided that a hearing should be held and evidence should be received on the change

14. At page 227 of the transcript of Proceedings on Motions counsel for Perkins renewed his motion which had been denied before Blumenfield's motion had been heard.

of venue question, the trial judge refused to exercise legal discretion during that very hearing. He declined to listen to "all the facts" (see quotation from *Bowles v. Goebel* above). *He would not listen to evidence of Blumenfield's bad reputation!*

Counsel produced many newspaper clippings and a great quantity of evidence with regard to broadcasts about Blumenfield, whom the newspapers of the district had long reviled and castigated.[15] However, as the Assistant United States Attorney had acknowledged at page 60, the question was not merely what the newspapers had said. The question was whether whatever appeared in the newspapers and had been broadcast over the air had prejudiced the public against this defendant.

One, but not the only, way of attempting to find this out would be to ask the members of the jury panel on their voir dire. But, if the prejudice of the public was great as we expected to show it was, the reliability of the voir dire testimony given by veniremen anxious to "get" Blumenfield would vary in inverse proportion to the strength of the prejudice.

Accordingly, the case was one in which prejudice could best be determined by evidence as to Blumenfield's bad reputation, in modern parlance "bad image". What was the "speech of the community" about him?[16]

---

15. These clippings showed that Blumenfield had been tried for the murder referred to at page 104 of Schlesinger, "The Politics of Upheaval" (Cambridge, 1960); that he was known as "Kid Cann" and that he was head of "The Kid Cann Syndicate", a liquor selling (formerly bootlegging) syndicate, members of which had been tried for kidnapping. The clippings made Blumenfield out to be a hoodlum, who has been accused by a former United States Attorney and former Republican candidate for governor of being a gangster and racketeer and who had looted the local traction company. One clipping, published in the Minneapolis Star shortly before the trial, painted Blumenfield as a panderer who received most of Tollefson's earnings (Transcrip of Proceedings on Motions, p. 282).

16. Of course, it is axiomatic that the necessity of receiving reputation evidence is to be found where there is a general dearth of

As the Supreme Court of Pennsylvania said in considering this very question in *Pennsylvania R. R. Co. v. City of Reading*, 254 Pa. 110, 116, 98 Atl. 791:

> "In order to make the effect attributed to the newspaper publications by the witnesses appear as a reality to the court, it would seem that there ought to be some proof of the actual and present existence of an unfriendly sentiment by means of recent expressions of feeling, opinions, or prejudices, traceable to the cause stated—something to indicate with a reasonable degree of directness and positiveness that an adverse impression made by the publications at the time is still active in the minds of the people . . ."

Accordingly, defense counsel in the present case offered to prove by the testimony of qualified persons (a) what Blumenfield's image or reputation was in the speech of the community, and (b) that Blumenfield in the opinion of these witnesses could not receive a fair trial in the district.[17] Objections to both types of testimony were sustained. If *either* ruling was erroneous, there should be a new trial.

See, for example, the testimony of Merle Edwards, General Manager of Radio Station WMIN with a potential audience in the five county area of close to one million persons. At page 188 Edwards testified that he had talked with persons in the district about Blumenfield. Counsel then asked him whether he was familiar with the image (reputation) of Blumenfield created in the minds of the people in the district. An objection to this was sustained (188, 189). Edwards then testified that his reading of

---

other satisfactory evidence of the desired fact, by reason of which the court is thrown back upon reputation as a source of information. Wigmore, 3rd Ed., Vol. 5, Sec. 1580, p. 444.

17. In refusing to permit defense counsel to elicit such testimony the trial judge did not suggest affidavits would have been admissible; voluntary affidavits were neither sought nor offered, since the witnesses were not friendly (98, 100).

newspapers and his listening to television and radio broadcasts about Blumenfied was more than normal because of the business Edwards was in (189, 190). Counsel then asked Edwards whether as a result of what he had read and had heard, and as a result of discussions which he had with other persons, he had an opinion as to whether a jury from the district could give Blumenfield a fair and impartial trial. Objection to this was sustained (190).

Counsel then offered to attempt to get the same testimony as to Blumenfield's reputation and as to whether the trial could be fair from a large number of other witnesses whom he had subpoenaed.[18] The trial judge and the Assistant United States Attorney agreed that the record should show that the Assistant United States Attorney would make the same objections and the Court would sustain the objections, just as the Court had done with the witness Edwards (191, 192).

Before overruling the motions for transfer to another district (p. 296), the trial judge expressly rejected the theory of defendants that the publicity given Blumenfield would make it impossible to find a fair jury. The court took the view that there "must" be twelve people in the district who could be fair (p. 293). As we have demonstrated, the court did so *after* refusing to permit the defendants to prove by the above witnesses (a) Blumenfield's bad reputation, and (b) that a fair trial would be impossible. The former was certainly admissible. We think the latter was also. Under Rule 21 of the Rules of Criminal Procedure the Trial Court has discretion to grant or refuse a motion for change of venue. But it has no discretion to refuse to hear competent and relevant evidence upon which such a decision is to be made.

---

18. It was made clear counsel wanted to prove Blumenfield's bad reputation; that the trial could not be fair and that the message of the press and the radio and TV stations reviling Blumenfield had reached the people. In this connection see pages 132, 133, 141 in addition to the above.

At pp. 381, 383, both defendants renewed their motions for transfer to another district and the trial judge denied the motions.

The trial judge prevented himself from exercising informed discretion in passing upon the motions. Since discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation,[19] this means judicial discretion was not exercised.

The District Court Violated the Rule of Krulewitch v. United States.

In a White Slave Traffic Act case, *Krulewitch v. United States*, 336 U. S. 440, 442, 443, 69 S. Ct. 716, 718, this Court held that an out-of-court declaration by one conspirator about the involvement of another conspirator was inadmissible in evidence because the declaration had not been made in furtherance of the conspiracy. The Court pointed out that the declaration had been made *after* the conspiracy had been concluded. But that was said merely for the purpose of showing that the declaration had not been made in futherance of the conspiracy. It is clear from the Opinion of the Court that a declaration by one conspirator is not receivable against another unless it was made in pursuance of the conspiracy, without regard to the time when it was made.[20]

In *Krulewitch* the out-of-court declaration was a request to the prostitute that she perjure herself in order to protect the co-conspirator. The trial judge in the present case admitted into evidence over objection exactly the same evidence that was held inadmissible in *Krulewitch*, except that the error was more grave in the present case. For, in

19. *Bowles v. Goebel*, 151 F. 2d 671, 674 (8 Cir.).

20. In the present case, the prosecution has contended the conspiracy was not yet over when the declaration was made. Petitioners have contended it was over, for they both were acquitted of all charges following in time the making of the declaration. Whichever view is correct, the declaration clearly was not made in furtherance of the conspiracy.

the present case the alleged conspirator (Perkins) who supposedly told Tollefson how to testify, also told her that the instructions emanated from the other alleged conspirator (Blumenfield).

The parts of the record pertaining to this point are N. T. pp. 131-146. We submit the point is sufficient, in itself, for certiorari to be granted.

The Evidence Showed No Violation of the Act.

The White Slave Traffic Act applies to non-commercialized vice. *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192. See *United States v. Reginelli*, 133 F. 2d 595 (3 Cir.).

We can understand such application of the statute where a man has used the channels of interstate commerce to debauch a woman or girl. And it goes without saying that the Mann Act is aimed at panderers or proprietors of houses of prostitution who induce prostitutes to travel in interstate commerce so that they may profit from their illicit activities.

However, the present case is unique. We believe that the prosecution has gone beyond anything Congress ever envisaged. Instead of prosecuting the prostitute or her panderer (as would happen in a state court) they have prosecuted and convicted the customer, Blumenfield. We ask that this novel excursion on the part of the prosecuting authorities be terminated by the entry of judgment of acquittal for the customer Blumenfield, and for Perkins who allegedly conspired with him.

Special Considerations as to Perkins.

Perkins has been convicted only for having conspired with Blumenfield. If there is a lack of proof of the conspiracy, both petitioners must be acquitted; for the indictment does not contain any charge with regard to "divers other persons". *Gebardi v. United States*, 287 U. S. 112, 53 S. Ct. 35. In this subsection we shall try to demonstrate the complete absence of proof that Perkins conspired.

In commencing the assignment, we note that by the acquittals on the substantive indictments (see Transcript of Voir Dire Examination, pp. 5, 6), Blumenfield now has been found for all judicial purposes not to have induced Tollefson to travel on December 24, 1955, on February 13, 1957, or on July 14, 1958, or thereabouts and Perkins has been found *never* to have aided Blumenfield in connection with Tollefson's alleged travels. Under the Seventh Amendment the fact of defendants' innocence as to these travels by Tollefson cannot be re-examined except according to common law rules of res judicata and, according to those rules, the innocence of defendants has been conclusively established. *Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237; *United States v. De Angelo*, 138 F. 2d 466 (3rd Cir.) (all this assumes what we deny, to wit that the indictments are valid).

It is clear that the vital element of knowledge is missing so far as Perkins is concerned and therefore criminal conspiracy is not attributable to him or to Blumenfield. To be sure, Perkins himself testified that "in a vague way" he knew Tollefson and Blumenfield were "going together" at some unspecified time (N. T. p. 784). But this does not mean he knew at the time or even thereafter that they were committing adultery with each other. Even less does it mean that he consciously did anything to aid or abet Blumenfield in doing anything to induce Tollefson to come to Minneapolis.

We also note Tollefson's testimony at N. T. p. 110 that she had occasion to call Perkins for money from time to time. This does not make Perkins a conspirator. For one thing, Perkins had no stake in the venture, and, therefore, is not guilty of conspiracy. *United States v. Falcone*, 109 F. 2d 579 (2 Cir.) aff'd 311 U. S. 205, 61 S. Ct. 204. Furthermore, knowledge of the alleged immoral purpose for which the travel money was a prerequisite was absent and Tollefson herself testified at N. T. p. 239: (a) that she never asked Perkins for money so that she could prostitute herself; (b) that her relations with Perkins were such

that she would not ask Perkins to give her money so that she could be a prostitute; and (c) that she wouldn't "say" that the money she asked Perkins for was to be used for any immoral purpose. Now it is not clear whether she meant that she wouldn't "say" it to the jury at the trial or that she didn't "say" it to Perkins when she asked for the money. But this much is clear: at no point did Tollefson testify that she or anyone else ever said to Perkins that the money was to be spent for an immoral purpose and no other evidence justifies such an inference.

In his opinion, the trial judge conceded that it was difficult to determine whether the conspiracy charge had been sustained. He then proceeded to sustain it by making the following assertions all of which we dispute. We respectfully ask this Court to look for itself and see whether we are not right.

The trial judge said that during the period of the conspiracy Perkins must have known that the Tollefson woman was a prostitute and that she was obtaining substantial support from Blumenfield in Minneapolis in return for her prostitution activities. For this to be true the evidence would have come from either Perkins or Tollefson. As we have shown, it came from neither of them.

The trial judge says that Perkins must have known Tollefson's trips from Chicago to Minneapolis were for the purpose of carrying on sexual relations with Blumenfield. There is no evidence that he had any such knowledge. Furthermore, the acquittal of Blumenfield as to three of the four alleged trips and of Perkins as to all four of them establish as a matter of law that Blumenfield did not induce three of such four trips for purposes of prostitution and Perkins did not help him to induce any of the four of them. *Sealfon v. United States*, 332 U. S. 575, 68 S. Ct. 237; *United States v. De Angelo*, 138 F. 2d 466 (3rd Cir.).

The trial judge relies on the theory that the jury "must have assumed" that Perkins was not to be believed when he

testified that the money he sent Tollefson for trips was his own money and was in no way associated with any scheme for Blumenfield's sexual gratification. To this we respond that, even if Perkins' testimony was not to be believed, there nevertheless is no evidence to show he was guilty, i.e., to show the opposite of his testimony. The alleged fact that his testimony is unbelievable cannot mean that the opposite of the testimony may be "assumed" to be true. *United States v. Pechenik*, 236 F. 2d 844, 847 (3rd Cir.).

The trial judge says that the instructions given to Perkins by Blumenfield about how Tollefson should testify when Tollefson was called before the grand jury in February, 1957 show that there was a close relationship between Perkins, Blumenfield and Tollefson. But there is nothing to show that Perkins knew that the testimony Tollefson gave was false, if indeed it was false. In any event, the instructions given Tollefson by Perkins had nothing to do with inducing Tollefson to travel from state to state for purposes of prostitution.

The trial judge refers to Tollefson as having testified that in 1954 Blumenfield told her that she should either telephone him or get in touch with Perkins when she needed money. There is no such evidence in the record. The trial judge appears to have been under a misapprehension as to N. T. p. 54 where Tollefson testified that in 1954 Blumenfield had given her an instruction that if she wanted to contact him at all she should do so by calling him or by contacting Perkins. There is no testimony that Blumenfield told her that she was to do this when she needed money or when she needed to travel for immoral purposes.

It must be remembered that Perkins was in the habit of sending Tollefson his money on occasions other than when she took trips to Minneapolis (N. T. p. 110). Tollefson's many letters to Perkins were read into evidence. None of them mentioned Blumenfield (N. T. pp. 241-421). They show that she asked Perkins for money whenever she needed it and wanted to ask for it. Her requests had noth-

ing to do with prostitution or other immoral practices. The Court of Appeals said in its opinion that the question was "whom, and what to believe" (Appendix A, p. 10a). This we deny. Regardless of whom you might believe in this case, and no matter what evidence you credit, the witnesses and the evidence did not spell out guilt.

In short, as the Court will find from its own examination of the record, there is nothing to show directly or circumstantially that Perkins ever conspired with Blumenfield. Perkins denied it expressly. Tollefson denied it generally. No one contradicted either denial. There is nothing from which a conclusion of conspiracy can be drawn. Accordingly, judgment of acquittal should have been entered as to Perkins on the conspiracy indictment. Judgment of acquittal as to Blumenfield on it would then automatically follow.

It must be remembered, that on the conspiracy indictment these defendants were not charged with conspiring to be law violators or offenders in a general sense. They were charged with conspiring "to commit certain offenses" (R. 19) and the "certain offenses" were those which would have been covered by the substantive indictments if they had named Tollefson. There was no evidence of any other alleged violations of the White Slave Traffic Act.[21] But the jury acquitted Perkins on three of the four substantive indictments *and the trial judge acquitted him on the fourth.* This must mean that Perkins did not conspire to commit any of the alleged offenses. For if he had so conspired, he would be guilty of the substantive offense of which Blumenfield remains convicted.[22] Accordingly, a judgment should now be entered acquitting Perkins of the con-

21. In this part of our brief, we are temporarily assuming arguendo something which we actually deny, i.e., that the several indictments are sufficient.

22. A conspirator is always guilty of crimes committed by a co-conspirator within the scope of the conspiracy and in pursuance of it. *Pinkerton v. United States*, 328 U. S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489.

spiracy.[23] It would then follow that Blumenfield must also be acquitted of the conspiracy, for Perkins is the only person with whom Blumenfield is even accused of conspiring.

CONCLUSION.

For the reasons set forth herein, we respectfully submit that this petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
MCBRIDE, VON MOSCHZISKER & BRADLEY,
E. DAVID ROSEN,
Attorneys for Petitioner Isadore Blumenfield.
HENRY H. BANK,
Attorney for Petitioner Monte Perkins.

Certificate of Service.

I certify that I have served by United States mail upon Solicitor General of the United States, Department of Justice, Washington 5, D. C., five copies of the foregoing petition for a writ of certiorari and that I have served five copies thereof, by mail, upon the United States Attorney, United States Courthouse, Minneapolis, Minnesota.

MICHAEL VON MOSCHZISKER,
an Attorney for Petitioner Isadore Blumenfield.

---

23. The sixth overt act covered a trip as to which there is no substantive indictment. As to Perkins, there is no evidence he knew of the trip. As to Blumenfield, there is no evidence he induced it (N. T. p. 103).

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Nos. 16,465, 16,466, 16,467.

ISADORE BLUMENFIELD,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

ISADORE BLUMENFIELD,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

MONTE PERKINS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the District of Minnesota.

[November 15, 1960.]

Before SANBORN, WOODROUGH, and MATTHES, *Circuit Judges.*

MATTHES, *Circuit Judge.*

A federal grand jury at St. Paul, Minnesota, returned four indictments against Isadore Blumenfield and Monte

Perkins[1] charging them with violations of the so-called White Slave Traffic Act, Title 18, U. S. C. A. § 2422 on four separate dates, between December 24, 1953 and July 14, 1958, and one indictment charging an unlawful conspiracy. The latter, based upon Title 18, U. S. C. A. § 371, charged that between September 1, 1954, and September 1, 1958, at Minneapolis, Minnesota, and divers other places to the grand jury unknown, Blumenfield and Perkins conspired to commit certain offenses against the United States in violation of Title 18, U. S. C. A. § 2422, and that in furtherance of the conspiracy the defendants performed 13 separate overt acts, set forth explicitly in the indictment. It is sufficient to say that each of the overt acts named one Marilyn Ann Tollefson as the object of the defendants' activities.

Upon motion the cases were consolidated for trial.

Defendants were convicted on indictment No. 71,[2] which charged a substantive offense, and on indictment

---

1. The indictments recited that Blumenfield was "also known as 'Kid Cann,' 'Ferguson,' and 'Fergie Bloom' " and that Perkins was also known as "Monte Percansky." Although Blumenfield's aliases were stricken by the court prior to trial, he was referred to under these various names in testimony.

2. Because of the attack made thereon indictment No. 71 is here set out verbatim:

"INDICTMENT

(Title 18 U. S. C., Sec. 2422).

"The Grand Jury Charges:

"On or about the 8th day of May, 1956, in the City of Minneapolis, County of Hennepin, State and District of Minnesota, one

ISADORE BLUMENFIELD,
also known as
Ferguson, and Fergie Bloom,

did knowingly persuade, induce and entice a woman to go by common carrier, to wit, an airplane, from Chicago, Illinois to Minneapolis, Minnesota, for the purpose of prostitution, debauchery, and other immoral practices, and with the intent and purpose that said woman engage in the practice of prostitution, debauchery, and other immoral practices, and did thereby knowingly cause said woman to be trans-

No. 74, the conspiracy charge. The court sustained Perkins' after trial motion for judgment of acquittal of his conviction under indictment No. 71. Blumenfield was adjudged to serve a sentence of two years and pay a fine of $2,500. This was a single general sentence on indictments Nos. 71 and 74. Perkins was sentenced to a year and one day on his conviction on indictment No. 74. Both were acquitted by the jury on indictments Nos. 70, 72 and 73.

Sufficiency of Indictments.

Defendants attack the indictments, claiming they are invalid because they fail to name the woman alleged to have been induced to travel in interstate commerce, etc., in violation of the statute, Title 18, U. S. C. A. § 2422.[3]

Firmly entrenched is the constitutional principle that, to be valid, an indictment must sufficiently advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial and, after judgment, be able to plead the record and judgment in bar of a further prosecution for the same offense. *Rosen v. United States*, 161 U. S. 29, 40; *Wong Tai v. United States*, 273 U. S. 77, 80, 81; *Bartell v. United States*, 227 U. S. 427, 431; *Stirone v. United States*, . . . U. S. . . . , 80 S. Ct. 270; *Tubbs v. United States*, 8 Cir., 105 F. 59.

At a pre-trial hearing on the motions to dismiss the indictments, the government attorney made this statement, "I think he (counsel for defendants) knows that the victim in this case is a woman by the name of Marilyn Ann Tollefson, and if he doesn't know that we will spread it on the record at this time * * *." He further suggested that

---

ported as a passenger upon the line and route of said common carrier, and at the aforesaid times and places, one

MONTE PERKINS, also known as
Monte Percansky,

also named as a defendant herein, did knowingly aid, abet, counsel, command, induce and procure the commission of the aforesaid offense."

3. As we have seen, indictments Nos. 70, 71, 72, 73 charged inducement of "a woman," without giving her name.

a bill of particulars would remedy the situation complained of. The trial court ruled that in his opinion it was not necessary for the indictments to name the woman, that this omission could be cured by a bill of particulars, stating to defendants' counsel: "you may resort to a motion for a bill of particulars, and on such a motion it will follow that the Court will require the United States Attorney to name the woman involved. That has already been indicated here openly in Court * * *."

We are not persuaded by defendants' argument that the omission of Marilyn Ann Tollefson's name from the indictment rendered it completely impotent as a true bill and that trials upon the indictments violated the Fifth and Sixth Amendments of the Federal Constitution. The indictments were in the language of the statute—they were not vague, but were sufficient to inform the defendants of the charge they had to meet and afforded them reasonable opportunity to prepare their defense. The omission of the name of the woman transported does not in our considered opinion render the indictment any more invalid than did the failure of the indictment to set out the contents of the obscene, lewd and lascivious letter in *Tubbs v. United States*, 8 Cir., 105 F. 59, and *Bartell v. United States*, 227 U. S. 427; or failure to allege that the victim was transported by "common carrier," see *Sun Chong Lee v. United States*, 9 Cir., 125 F. 2d 95; or failure to allege the mode of transportation, *Mellor v. United States*, 8 Cir., 160 F. 2d 757, 760, cert. den. 331 U. S. 848. If defendants were motivated by good faith in their assertion that they would have difficulty in defending the charge, or that the omission of the name of the woman transported might not protect them subsequently in a plea of former jeopardy, they could have called for a bill of particulars. See *Heasley v. United States*, 8 Cir., 218 F. 2d 86, 89, cert. den. 350 U. S. 882; *Rosen v. United States*, 161 U. S. 29, 34, 40. As we have seen, the court announced that, upon request, it would require the Government to provide de-

fendants with a bill of particulars, this notwithstanding that the woman's name had been stated in open court. Defendants failed to avail themselves of this remedy.

The lack of substance with respect to this contention becomes more apparent when it is viewed in light of indictment No. 74, which charged the conspiracy. There, Marilyn Ann Tollefson was named in each of the 13 paragraphs setting forth the overt acts committed in furtherance of the conspiracy. Finally, it should be noted that the Government at no time suggested that defendants had ever induced any person other than Marilyn Ann Tollefson to travel in interstate commerce for purposes prohibited by the Act. She and she alone was the object of defendants' unlawful activities. On this record we are satisfied that the defendants were not prejudiced because of the failure of the indictment in the respect mentioned; they were not surprised, neither did the omission prevent their ability to meet the charge and prepare for trial, and they could successfully plead the record and judgment to bar a further prosecution for the same offense.

Motion for Examination of Grand Jury Minutes.

Denial of defendant Blumenfield's motion to inspect the minutes "for the exclusive purpose of determining how many women testified before it" is the basis for the argument that the indictment was not based upon proper evidence—the theory being that some grand jurors may have found that defendants induced woman "A" while others may have found that defendants induced woman "B".

The rule of secrecy surrounding grand jury proceedings must govern unless there is a "clear showing" of good cause. *Costello v. United States*, 8 Cir., 255 F. 2d 389, 396, cert. den., 358 U. S. 830. There is a presumption that the grand jury acted on sufficient evidence. *United States v. Texeira*, 2 Cir., 162 F. 2d 169, 170; *United States v. Weber*,

2 Cir., 197 F. 2d 237, 238, cert. den., 344 U. S. 834. Inasmuch as there were no affidavits supporting the motion, nor any factual allegations indicating insufficiency of evidence or any other irregularity upon the part of the grand jury in delivering a true bill, the trial court was fully justified in concluding that the motion constituted a "fishing expedition" and the denial of access to the grand jury minutes was clearly proper.

Transfer of Venue.

By separate pre-trial motions, defendants petitioned for transfer of the case to another district, as authorized by Rule 21(a) of the Federal Rules of Criminal Procedure, alleging that because of prejudice against defendants in the District of Minnesota, they could not obtain a fair and impartial trial in that district. Alternatively, Blumenfield requested that the proceeding be transferred to the Northern District of Illinois, sitting at Chicago, as authorized by Rule 21(b), on the theory that venue of the offense could have been laid in the first instance in the Illinois district. Perkins' motion was denied on October 26, 1959. A 3-day hearing on Blumenfield's motion was conducted and Perkins renewed his request for transfer at that time. The court denied both motions without prejudice to renew the same if upon voir dire examination of the jury panel, it was demonstrated that defendants could not obtain a fair trial in the District of Minnesota.[4]

At the hearing on this issue, the court admitted, and personally examined, numerous local newspaper clippings, microfilm strips, and radio and television scripts, covering a period of approximately 25 years, indicating that Blumenfield had been depicted as an individual of ques-

4. After an exhaustive resume and analysis of the facts and circumstances bearing upon the motions for transfer of venue, the trial judge stated: "In the event I am mistaken and examination of the jurors on voir dire demonstrates my error, then defendant will be granted the right to renew his motion for a change of venue."

tionable and unsavory character. Typical examples were newspaper clippings relating to his trial and acquittal for murder in 1936, together with various references to his connection with the "Kid Cann Syndicate," an organization composed of questionable characters engaged in selling liquor. Other articles indicated that a former United States Attorney in Minnesota, while a candidate for governor of that state, had accused Blumenfield of being a racketeer and participating in the looting of the local transit company.[5]

Defendants do not directly challenge the propriety of the court's action in refusing to transfer the case. Rather, they advance the contention that, because of the refusal to admit certain testimony, the court could not properly exercise its discretion in passing upon the motions to transfer.

In addition to the documentary evidence, defendants also sought to elicit oral testimony from a local radio station manager indicating that Blumenfield could not receive a fair trial in the district. This line of inquiry was objected to, the United States Attorney taking the position that the proper foundation had not been laid for such testimony, and that the witness was not qualified to pass upon the state of mind of prospective jurors. The court agreed and sustained the objection.[6]

We are not persuaded by the argument that there was insufficient basis for the court to exercise a legal discretion in his ruling on the petitions for transfer. It is of course recognized by defendants that a petition for transfer or change of venue is addressed to the sound discretion of the court, and a denial thereof will not be disturbed unless it

5. Blumenfield was also indicted by a federal grand jury, along with others in connection with the "Twin Cities Rapid Transit Company" case. He also petitioned for transfer of venue in that case, but on hearing for transfer in this case, withdrew his petition in the Twin Cities case. It appears that he was acquitted on all counts in that case.

6. It was agreed that the same objection and ruling would apply to a number of other news, radio and television witnesses which defendants had subpoenaed for the purpose of showing local prejudice.

is demonstrated that the denial was an abuse of discretion. See *Connelly v. United States*, 8 Cir., 249 F. 2d 576, 584, 585, cert. den., 356 U. S. 921.

It is clear that the mere presence of adverse publicity does not per se establish proof of prejudice, or necessarily establish that a defendant will be unable to obtain a fair trial within the district. "The mere fact that a juror has read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror." *Finnegan v. United States*, 8 Cir., 204 F. 2d 105, 110, cert. den., 346 U. S. 821. The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination. See *United States v. Dioguardi*, S. D. N. Y., 20 F. R. D. 33, 36.

In turning to the record, it is manifest that the denial of a change of venue was not an abuse of discretion. The transcript covers 485 pages of meticulous, detailed and individual examination of 55 prospective jurors, covering a period of three days. Forty-one of these were examined for the original panel of 30; an additional 14 were examined for a panel of 10 from which 4 alternate jurors were chosen. Concededly, many of the jurors were familiar with defendant Blumenfield's name and had read news articles from time to time in connection with his activities. Others, however, had not; jurors were drawn from a wide area, some, 90 to 100 miles from Minneapolis. Judge Nordbye of the trial court was familiar with the local situation, and with 38 years of judicial service within the area, he was eminently qualified to rule upon the question of prejudice. It is significant to note that no challenge was made to the panel as a whole. Ultimately, of course, the acquittal of Blumenfield on three of the five charges strongly belies any suggestion that he could not receive a fair trial in the District of Minnesota. Any claimed error in excluding testimony alleged to be proof of actual prejudice upon the motion to transfer is without substance and

borders upon mootness, inasmuch as subsequent events upon *voir dire* examination, together with the verdict of the jury, completely negate the contention that prejudice did exist. See and compare, *Finnegan v. United States*, supra; *Connelly v. United States*, supra; *United States v. Dioguardi*, supra; and *Bianchi v. United States*, 8 Cir., 219 F. 2d 182, cert. den., 349 U. S. 915.

Sufficiency of the Evidence.

The defendants urge that the evidence is insufficient to support the convictions. Realistically, this contention constitutes an effort to have us weigh the evidence. This we are not permitted to do. "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U. S. 60, 80. As we stated in *Garner v. United States*, 277 F. 2d 242, at p. 244: "(t)he Government, as the prevailing party, is, of course, entitled to the benefit of all reasonable inferences which can be drawn from the evidence tending to support the verdicts."

The actual trial of this case consumed nearly five and one-half days. We have, in view of the instant assertion, given meticulous consideration to the voluminous record.

Basically, the issue here is one of credibility. The Government's case rested upon the testimony of Marilyn Ann Tollefson, an admitted prostitute. Written exhibits, such as hotel records, money order forms and telephone records, tended to corroborate her testimony. Blumenfield did not testify. Perkins' testimony was flatly contradictory to that of Tollefson's in all material respects as to the relations between herself, Perkins and Blumenfield. In addition, defendants introduced some 28 written communications from Tollefson, all, with the exception of one, directed to defendant Perkins. Generally speaking, it appears that defend-

ants, through these exhibits, hoped to establish the relationship between Perkins and Tollefson as being that of "brother and sister" and incidentally to establish the unwholesome character of Tollefson's life throughout the period in controversy. Apart from Perkins' flat denial of the material portions of her testimony, the principal efforts of the defense were directed to discrediting the testimony of Tollefson. Thus, in addition to sordid details of her life as a prostitute, there was evidence that she wrote bad checks, cheated hotel people, betrayed the confidence of her friends, that she was an alcoholic and a perjurer and greedy for money. Most of these things she admitted herself, upon cross-examination.

Obviously, the issue of credibility—of whom, and what to believe, was particularly within the province of the jury. Under these circumstances, and upon review of the record, we find that the verdicts were supported by substantial evidence.

The Substantive Charge.

This involved transportation on May 8, 1956. Without going into great detail, the jury was entitled to find that Tollefson admittedly became a prostitute in 1953 when she was about 20 years of age. Her story, undisputed as to many salient events, reveals a sordid, lewd, and lustful existence. To state the evidence in detail would unduly and unnecessarily burden this opinion, and certainly would not prove edifying. She testified that from November 1953, to July, 1954, she lived in hotels in Minneapolis, Minnesota, during which time she and Blumenfield carried on an illicit affair, occasionally with sexual relations of an unnatural nature, and that she received money from Blumenfield for these activities. In July, 1954, she went to New York, where she remained until November, 1954. Thereafter she was in different large cities in the United States, such as Chicago, Illinois, and Miami, Florida, prac-

ticing her profession with various men, for money. Intermittently, however, she would return to Minneapolis, and it was these trips that produced the links in the chain sufficient to bring about the conviction of the defendants. Focusing our attention on the facts sustaining indictment No. 71, the undisputed evidence is that in May, 1956, Tollefson, after speaking to "Fergie" on the telephone, made a trip by common carrier from Chicago to Minneapolis, where reservations had been made for her at the Dyckman Hotel. She met Blumenfield at the Kenesaw Bar, where the latter told her that she should go back to the hotel and he would bring Bob Ossanna to her room. This was done, and in the presence of Blumenfield, Tollefson and Ossanna engaged in an unnatural sexual act, after which she proceeded to have sexual relations with Blumenfield. For these performances Tollefson received $200 from Blumenfield. Tollefson testified that her only reason for going to Minneapolis was for the immoral purpose of carrying on prostitution with Blumenfield, for money.

The gravamen of the offense proscribed by Title 18, U. S. C. A. § 2422, is knowingly persuading, inducing, enticing or coercing any woman to go from one place to another in interstate commerce, for the purpose of prostitution or debauchery, or for any other immoral purpose, whether with or without the consent of the woman. Under the evidence discussed above, the question of Blumenfield's guilt or innocence was clearly for the jury. There was substantial evidence, uncontradicted in fact, from which the jury reasonably and legitimately could infer that Tollefson's May, 1956, trip was induced by Blumenfield, and for the purposes prohibited by the statute. See and compare, *Caminetti v. United States*, 242 U. S. 470, 486; *Cleveland v. United States*, 329 U. S. 14, 17; *Gauch v. United States*, 8 Cir., 212 F. 2d 520, 527; *Holder v. United States*, 8 Cir., 271 F. 2d 214, cert. den., 361 U. S. 933, involving prosecution under § 2421, but analogous in principle; *Berra v. United States*, 8 Cir., opinion filed October 28, 1960.

F. 2d . . ., also involving prosecution under § 2421, but clearly analogous.

Conspiracy Charge.

Defendants insist that "(t)here simply is not any evidence that Perkins ever conspired with Blumenfield to transport, etc., Tollefson, * * * that the vital element of knowledge is missing so far as Perkins is concerned and therefore criminal conspiracy is not attributable to him or to Blumenfield." In resolving this issue, we have in mind certain rules so clearly enunciated by this Court in *Phelps v. United States,* 169 F. 2d 858, 867, cert. den 334 U. S. 860:

> "* * * (u)nder the federal statute conspiracy is a joining of intentions to engage in or further some unlawful action together, plus the taking of any step by one or more of the parties toward effecting the mutual object. * * * Such a joining of intentions into a conspiracy may, and ordinarily only can, be established by inference from evidence of relationships and conduct and other probative circumstances. (citing authorities). Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is part of it."

Conspirators ordinarily do not announce that they have joined their efforts for the purpose of engaging in or furthering some unlawful scheme or plan—rather they are inclined to cover their machinations, thereby casting upon the prosecution the burden, sometimes difficult, of establishing the conspiracy, and the overt acts in consequence thereof, by circumstantial evidence,—by actions of the conspirators. "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States,* 315 U. S.

60, at p. 80. This rule has received abiding recognition. See *Williams v. United States,* 4 Cir., 271 F. 2d 703, 706; *Holder v. United States,* supra, 271 F. 2d 214; *Marx v. United States,* 8 Cir., 86 F. 2d 245, 250.

There is no direct evidence that Blumenfield and Perkins entered into a scheme to procure the transportation of Tollefson in interstate commerce for immoral purposes, but there are circumstances, based on probative evidence, sufficient to support a reasonable inference of such a conspiracy. To begin with, Perkins, a married man, admitted having sexual intercourse with Tollefson "a few times at the Mark Twain (Hotel) in the early part of '54." He and Blumenfield were close acquaintances throughout the period covered by the indictments. In June, 1954, Tollefson was arrested in Minneapolis for issuing bad checks. She testified that she first tried to contact Blumenfield, and being unable to do so, called Perkins, who responded immediately; that Perkins informed the police officers that he would call Blumenfield, and did in the presence of Tollefson; that shortly thereafter Perkins told her "that Fergie was sending somebody down right away and not to worry, that it would be taken care of right away." Tollefson testified further that Blumenfield sent the money to take up the bad checks, which amounted to more than $300.

She also testified that in July, 1954, she sent Blumenfield a telegram from New York requesting $200 and that the next day Blumenfield called her and "told me never to send him another telegram, ever, that I should call him, or if I couldn't contact him I should contact Perkins." Thereafter, and from time to time throughout the period covered by the indictments, Tollefson was in contact with Perkins. She wrote him numerous letters in some of which she professed her love for Perkins. She frequently requested money from Perkins, and although the evidence showed that Perkins had a very modest income, with a wife and three children to support, he nevertheless sent Tollefson money on different occasions, purchased cloth-

ing and other articles for her, and paid a substantial hospital bill which she had incurred. There was evidence that Perkins knew that Tollefson was prostituting herself. This is borne out rather strongly by several of her letters to him. Additionally, she testified that "Monte always wanted me to stay away from what he called two-bit hoodlums, jerks that hung around bars. He always told me to go after the real money * * * the big men." Furthermore, Perkins usually met Tollefson at the airport in Minneapolis when she arrived from Chicago, and the inference is clear that Perkins knew that Tollefson engaged in illicit affairs with Blumenfield after her arrival in Minneapolis.

That Perkins had knowledge concerning Tollefson's activities with Blumenfield is further substantiated by the events surrounding her appearance before the federal grand jury in February, 1957. While in Chicago and upon learning that a subpoena had been issued for her appearance before the grand jury, she testified that she contacted Perkins by telephone and requested him to find out "what it was all about;" that the same evening Perkins called back and informed her that the grand jury was trying to indict Blumenfield on "moral turpitude charges," and requested her to notify him when she would arrive in Minneapolis and that he would meet her; that she was met at the airport by Perkins who took her to the federal court house; that at that time she told Perkins that she had discussed her appearance before the grand jury with a lawyer in Chicago, who advised her "to take the Fifth Amendment," but not to lie. "Mr. Perkins advised me that Mr. Blumenfield did not want me to take the Fifth Amendment, but if I insisted upon doing so he would have a lawyer for me and a bondsman; but he would prefer that I not take the Fifth Amendment, but I should deny to the Federal grand jury that I ever had any sexual relationships with Fergie or that I had ever received any money from Fergie." She testified that she followed these instructions in her appearance before the grand jury by categorically

denying ever having sexual relations with Blumenfield, thus perjuring herself at the request of Monte Perkins. The secrecy of the grand jury proceedings with respect to her testimony was lifted by the court without objection and Tollefson's testimony before that body was related verbatim. It discloses that Tollefson denied any wrongdoing with Blumenfield. She testified that following her appearance before the grand jury, she went to Sugar's Bar where she met Perkins and informed him of what had transpired; that he then called Blumenfield, and she and Perkins went to the Kenesaw Bar where they met Blumenfield, and told him what had transpired, and that Blumenfield's only comment was "that they were getting pretty low when they were trying to indict him on his sexual life."

Without spelling out further details, we are firmly convinced that there was sufficient substantial evidence to fully support an inference that Perkins and Blumenfield had entered into a scheme to carry out and further Blumenfield's unlawful activities. As Judge Nordbye stated in his well reasoned memorandum opinion filed in connection with his action on after trial motions: "The evidence would fully support a finding that Perkins was a front man for Blumenfeld (sic) and a partner in the promotion of his interstate illicit activities in the transportation of the Tollefson woman."

The acquittal of Perkins on the four substantive charges does not, as suggested by defendants, require an acquittal on the conspiracy charge under the doctrine of res judicata. In *Garner v. United States*, in dealing with a similar question, we said, 277 F. 2d 242, at p. 245: "A substantive offense and a conspiracy to commit it are separate offenses. *Pinkerton v. United States*, 328 U. S. 640, 643-644, 66 S. Ct. 1180, 90 L. Ed. 1489. Furthermore, inconsistency in a verdict on the separate counts of an indictment or information does not entitle a defendant to the reversal of a conviction. *Dunn v. United States*, 284 U. S. 390, 393-394, 52 S. Ct. 189, 76 L. Ed. 356 (other cases cited)." Although the evidence may have been insufficient to convince

the jury or Judge Nordbye that Perkins was guilty of aiding and abetting the transportation on the four specific dates alleged in the substantive indictment, the conviction of conspiracy finds ample support in the record.

Evidentiary Matters.

Defendants complain and assign as error the action of the court in sustaining objection to Blumenfield's offer to prove that it was one Hy Brodie rather than Blumenfield who had committed the offenses for which Blumenfield was indicted; sustaining objection to defendants' offer of proof designed to establish Tollefson's bias in favor of the prosecution resulting from her stay in the Duluth Hotel; error in permitting the prosecution, over objection, to examine Tollefson as to testimony she gave to the grand jury in February, 1957.

We have examined these assignments carefully, and find no error. Defendants were represented by able and skilled trial lawyers who were given a wide berth in their cross-examination of all witnesses and particularly Tollefson. Indeed, it is our impression that the court generously permitted cross-examination on matters that were collateral to the issues at trial. The rule is that the limits of cross-examination upon collateral matters are peculiarly within the discretion of the trial court, and unless there is a plain abuse of discretion, the court's action will not be disturbed.[7] As stated, the defense made every effort to discredit Tollefson's testimony. Evidence regarding her affairs in Chicago and Las Vegas with other men, and her conduct while being held as a material witness were designed for this purpose. Clearly, there was no abuse of discretion in excluding further evidence along this line.

As noted above, Tollefson was permitted to testify as to her conversation with defendant Perkins in connection with her appearance before the grand jury. Upon objection of Blumenfield's counsel, the court first ruled that the

7. See *United States v. Manton*, 2 Cir., 107 F. 2d 834, 845, cert. den., 309 U.S. 644.

testimony would be binding only upon Perkins; however, after the witness had concluded her testimony, implicating Blumenfield, the court ruled that the testimony would be received as to both defendants. Blumenfield now complains that the admission of the testimony violated the teachings of *Krulewitch v. United States*, 336 U. S. 440. *Krulewitch* is not apposite and controlling; because there the conspiracy had ended prior to the time the conversation complained of took place. Here, the conspiracy was in existence, at least there was evidence justifying such a conclusion, when Tollefson conversed with Perkins. The admission of the testimony as to both defendants finds support in the rule that declarations of one conspirator may be used against the other not present on the theory that the declarant is the agent of the other and the admissions or statements of one are admissible against both. *Lutwak v. United States*, 344 U. S. 604, 617; *Cwach v. United States*, 8 Cir., 212 F. 2d 520, 525. Here, the evidence indicated that the statement was made with full authority of Blumenfield, and that he entirely approved of the perjury before the grand jury.

While objection was made to the testimony by Blumenfield, it appears that his counsel cross-examined Tollefson extensively on the subject—he endeavored to exploit her perjury for his client's benefit, but in any event, the ruling of the court was proper.

The record demonstrates that Judge Nordbye presided over the trial of this hotly contested case with patience and understanding. His rulings were motivated by a sincere desire to accord the parties a fair and impartial trial. His extensive charge to the jury covering approximately 66 pages of the transcript was viewed by the defendants as being so fair that they failed to take exceptions to any part thereof. He carefully considered all questions raised by defendants on their after trial motions, as manifested by his entry of a judgment of acquittal of Perkins on one charge. There was no error.

The judgments are Affirmed.

APPENDIX B.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1960.

No. 16465.

ISADORE BLUMENFIELD,
Appellant,
v.
UNITED STATES OF AMERICA,

Appeal from the United States District Court for the District of Minnesota.

and

No. 16466.

ISADORE BLUMENFIELD,
Appellant,
v.
UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of Minnesota.

These causes came on to be heard on the original files of the United States District Court for the District of Minnesota, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments and sentences of the said District Court appealed from in these causes be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Isadore Blumenfield, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgments and sentences imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 15th, 1960.

APPENDIX C.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1960.

No. 16467.

MONTE PERKINS, also known as Monte Percansky,
Appellant,
v.
UNITED STATES OF AMERICA.

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the original files of the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Monte Perkins, also known as Monte Percansky, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

November 15th, 1960.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

September Term, 1960.

No. 16465. ISADORE BLUMENFIELD, *Appellant,* *v.* UNITED STATES OF AMERICA.	Appeal from the United States District Court for the District of Minnesota.
No. 16466. ISADORE BLUMENFIELD, *Appellant,* *v.* UNITED STATES OF AMERICA.	Appeal from the United States District Court for the District of Minnesota.
No. 16467. MONTE PERKINS, *Appellant,* *v.* UNITED STATES OF AMERICA.	Appeal from the United States District Court for the District of Minnesota.

On Consideration of the motion of appellants for a stay of the mandates in these causes pending petition to the Supreme Court of the United States for writ of certiorari, it is now here ordered by this Court that the issuance of the mandates herein be, and the same are hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that petition for writ

of certiorari and record have been filed, the stays hereby granted shall continue until the final disposition of the cases by the Supreme Court.

December 1, 1960.

Order entered for the Court
by the Clerk under Rule 4(d).

LE COPY

Office-Supreme Court, U.S.
FILED
JAN 16 1961
JAMES R. BROWNING, Clerk

No. 585

In the Supreme Court of the United States

OCTOBER TERM, 1960

ISADORE BLUMENFIELD AND MONTE PERKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provision, statute and rule involved	2
Statement	3
Argument	10
Conclusion	18

CITATIONS

Cases:

Bartell v. *United States*, 227 U.S. 427	11
Caminetti v. *United States*, 242 U.S. 470	12
Cleveland v. *United States*, 329 U.S. 14	13
Dunn v. *United States*, 284 U.S. 390	15
Glasser v. *United States*, 315 U.S. 60	13
Hagner v. *United States*, 285 U.S. 427	11
Krulewitch v. *United States*, 336 U.S. 440	16
Mellor v. *United States*, 160 F. 2d 757, certiorari denied, 331 U.S. 848	11
Pinkerton v. *United States*, 328 U.S. 640	15
Rosen v. *United States*, 161 U.S. 29	11
Sealfon v. *United States*, 332 U.S. 575	15
Sun Chong Lee v. *United States*, 125 F. 2d 95	11
United States v. *Dioguardi*, 20 F.R.D. 33	12
United States v. *Datterweich*, 320 U.S. 277	15
United States v. *Freundlich*, 95 F. 2d 376	16
United States v. *Lewis*, 110 F. 2d 460, certiorari denied, 310 U.S. 634	11
United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909	12
Wallace v. *United States*, 243 Fed. 300	16
Wong Tai v. *United States*, 273 U.S. 77	11

Constitution of the United States:

	Page
Fifth Amendment	15
Sixth Amendment	2

Statute and rule:

18 U.S.C. 371	4
18 U.S.C. 2422	2, 3
Rule 21(a), F.R. Crim P.	3

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 585

ISADORE BLUMENFIELD AND MONTE PERKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–17a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1960. The petition for a writ of certiorari was filed on December 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment for a substantive Mann Act offense was fatally defective because it failed to name the woman transported.

2. Whether the trial court unduly restricted the evidence upon hearing of the motion to transfer.

3. Whether petitioner Blumenfield was properly convicted for violation of the Mann Act, although no motive of pecuniary gain was shown.

4. Whether the evidence sustained the convictions for conspiracy.

5. Whether the court erred in admitting evidence that petitioners improperly influenced testimony before the grand jury.

6. Whether the court unduly restricted cross-examination.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Sixth Amendment to the Federal Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *.

18 U.S.C. 2422 provides:

> Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a

> passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Rule 21(a), F.R. Crim. P., provides:

> The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

STATEMENT

Petitioners were tried together in the United States District Court for the District of Minnesota on five indictments for violations of the Mann Act and for conspiracy. Four indictments charged that petitioner Blumenfield, on different specified dates, induced a woman to go by common carrier, an airplane, from Chicago, Illinois, to Minneapolis, Minnesota, for the purpose of engaging in prostitution and other immoral practices.[1] The same indictments charged that petitioner Perkins aided and abetted the commission of said offenses. A fifth indictment charged that, between the approximate dates of September 1, 1954, and September 1, 1958, petitioners conspired to induce a woman to go by common carrier, to wit, an airplane, from Chicago to Minneapolis for the pur-

[1] 18 U.S.C. 2422.

pose of engaging in prostitution and other immoral practices, naming thirteen overt acts.[2]

A jury found petitioners guilty on the second and fifth indictments, but acquitted as to indictments one, three and four.[3] The district court imposed a single general sentence on Blumenfield of imprisonment for two years and a fine of $2,500 (R. 152–153).[4] Perkins was sentenced to imprisonment for a year and a day (R. 154).

Before trial, petitioner Perkins filed a motion to transfer the case to another district or for a continuance, which was denied on October 26, 1959 (R. 34). Petitioner Blumenfield moved to transfer the case from the district because of the prejudice of the inhabitants or, in the alternative, to transfer it to the Northern District of Illinois, on the theory that the venue could have been laid there in the first instance (R. 39). Perkins renewed his request for a transfer at that time. After consideration of the evi-

---

[2] 18 U.S.C. 371.

[3] The charges under the various indictments and their disposition were as follows:

Indictment 70, violation of the Mann Act on February 13, 1957: verdict, not guilty.

Indictment 71, similar violation on May 8, 1956: verdict, guilty; set aside by district court as to petitioner Perkins.

Indictment 72, similar violation on July 14, 1958: verdict, not guilty.

Indictment 73, similar violation on December 24, 1955: verdict, not guilty.

Indictment 74, conspiracy to commit such acts between, approximately, September 1, 1954, and September 1, 1958; verdict, guilty.

[4] "R." refers to the record, "Mot. Tr." to the motion transcript, "Jury Tr." to the *voir dire* transcript, and "Tr." to the trial transcript.

dence (newspaper clippings, radio comment, etc.), the motions were denied, with the right to renew if it became apparent on the *voir dire* examination that fair and impartial jurors could not be selected (Mot. Tr. 290–297).

Both petitioners also filed motions to dismiss the first four indictments, which charged substantive offenses, on the ground that they were vague and indefinite (R. 26, 38). Perkins' motion was denied on October 26, 1959 (R. 34). Blumenfield's motion came up for hearing on January 18, 1960, on which date he also filed a motion for bill of particulars as to various overt acts concerning Marilyn Ann Tollefson alleged in the conspiracy indictment (R. 47). During the hearing, it was urged that the substantive indictments were defective in failing to name the woman involved. The United States Attorney stated that the indictment was in customary form and that the name of the woman was Marilyn Ann Tollefson. The court said that if a motion for bill of particulars as to these indictments were filed, it would require that she be named. However, no such motion was thereafter filed. The motions to dismiss the substantive indictment were denied; the motion for a bill of particulars as to the conspiracy indictment was partially granted (Mot. Tr. 24–27).

The evidence at the trial may be summarized as follows:

Petitioner Blumenfield, a resident of Minneapolis, made the acquaintance of Marilyn Ann Tollefson in November, 1953 (Tr. 31). When Miss Tollefson's family learned that she was seeing Blumenfield, there

was an argument, following which she left home at Blumenfield's suggestion and moved to the Mark Twain Hotel, registering under the name of "Marilyn Cohn" (Tr. 39, 67). At first she lived entirely on the money given to her by Blumenfield (Tr. 43). She testified that this was the beginning of her life as a prostitute (Tr. 37).

In July, 1954, Miss Tollefson left Minneapolis and moved to New York. Her first act after arriving and registering at a hotel was to send a telegram to Blumenfield requesting that he send her two hundred dollars. He replied by telephone the following day, telling Miss Tollefson never to send him another telegram, as it could be traced; that she should contact him either by calling him or petitioner Perkins, or wiring Perkins. She testified that thereafter she always contacted Blumenfield in the suggested manner (Tr. 54).

After some time spent in Miami, Miss Tollefson returned to Minneapolis in January, 1955 (Tr. 54–57). She saw Blumenfield off and on and he would pay her when he stayed with her, but she was also "dating" other men (Tr. 54–57, 97). In July, 1955, she moved to Chicago (Tr. 101).

Following this, there were numerous trips back to Minneapolis made at Blumenfield's request. In October or November of 1955, she made such a trip. She believed, but was not sure, that Perkins sent her the money for her plane ticket. Blumenfield spent the night with her and paid her. When Perkins came to take her to the airport for her return flight to Chicago, he told the manager that Blumenfield

would pay the hotel bill. However, Miss Tollefson paid it (Tr. 103–107).

On December 24, 1955, Miss Tollefson[5] again flew from Chicago to Minneapolis to see Blumenfield, with money wired to her by Perkins.[5] When she arrived, she was seriously ill and Perkins, who met her at the airport, took her to her sister's house. Two days later, she was admitted to a hospital and treated for a kidney condition. Perkins visited her at the hospital and paid her bill there, which amounted to approximately three hundred dollars (Tr. 108–111). After she was released from the hospital, she stayed at a hotel where Blumenfield had made a reservation for her and where he visited her. She remained in Minneapolis for about two months and then returned to Chicago (Tr. 111–113).

Miss Tollefson testified that from time to time, both before this trip (Tr. 110) and thereafter (Tr. 121–122), she received money from Perkins in conformity with the telephone conversation which she had with Blumenfield when she first went to New York. Money orders from Perkins to Miss Tollefson were introduced to corroborate this testimony (Tr. 124–126).

In May, 1956, Miss Tollefson flew from Chicago to Minneapolis by reason of a telephone conversation which she had with Blumenfield.[6] The circumstances

[5] The occasion referred to by Indictment 73, as to which both petitioners were acquitted.

[6] The occasion referred to by Indictment 71. The jury found both petitioners guilty, but Judge Nordbye set aside Perkins' conviction.

580520—61——2

of Blumenfield's visit, in the company of a friend, were of an aggravated character, following which Blumenfield paid Miss Tollefson, she believed, two hundred dollars (Tr. 114–115). Corroborating testimony fixed the date of this assignation as May 8, 1956 (Tr. 495).

In January, 1957, while Miss Tollefson was working as a secretary in Chicago, she learned from a friend that there was a subpoena outstanding, calling for her appearance before a grand jury in Minneapolis. The friend took her to a lawyer's office, where she telephoned Perkins. Perkins said that he would inquire about it and call her back. He called within a few minutes and said that the grand jury was trying to indict Blumenfield on charges of moral turpitude. She accepted service of the subpoena at the lawyer's office, following which she flew to Minneapolis. She told Perkins, who met her at the airport, that the Chicago lawyer had advised her to plead the Fifth Amendment and under no circumstances to lie. Perkins told her that Blumenfield wanted her to testify before the grand jury and to deny any relationship with him and to say that she had never received any money from him (Tr. 130–134). Miss Tollefson testified that she complied with this request and lied to the grand jury. With the consent of the defense, the court permitted examination of the grand jury proceedings, and Miss Tollefson testified in detail as to the falsity of her testimony before that body (Tr. 133–141). (The foregoing testimony was initially admitted only as to petitioner Perkins (Tr. 133, 138).)

Following her appearance before the grand jury, Miss Tollefson met first with Perkins and then with both petitioners, and discussed her testimony. Later at a hotel, she told Blumenfield that she had done what he considered the right thing and what she also considered the right thing at the time. (The court then received the testimony as to both petitioners (Tr. 142–146).) Miss Blumenfield also testified that, following this conversation, she spent the night with Blumenfield and received two or three hundred dollars from him (Tr. 146).

Upon her return to Chicago, Miss Tollefson ran into difficulties on her job as a result of her testimony before the grand jury. She talked with both petitioners, and Blumenfield told her to come to Minneapolis, which she did. Perkins met her at the airport and took her to meet Blumenfield. She spent the night with Blumenfield and asked him for five hundred dollars to tide her over. The following day he sent Perkins over with the amount requested, but required her to sign a promissory note for it (Tr. 148–151).

Miss Tollefson held two jobs in Chicago for short periods of time thereafter, but lost them. She was doing a lot of drinking. She spent the night with Blumenfield in Chicago in April, 1958, but did not see him again in Minneapolis until July, 1958.[7] She called him and he told her to come up there if she wanted to. She spent the night with him and was paid (Tr. 159–162). She thought that she received money from Perkins one more time after that.

[7] The occasion referred to by Indictment 72, as to which both petitioners were acquitted.

Financial and other difficulties pursued her thereafter, and when she asked Perkins to get her money to bring her back from Las Vegas to Minneapolis, he told her to quit trying to "shake down" Blumenfield, and if she did not leave him alone she would be "in real trouble" (Tr. 173). Following this, she contacted federal authorities (Tr. 177–178).

Some thirty other witnesses testified on behalf of the government, corroborating Miss Tollefson's testimony at various points. Petitioner Perkins and two other witnesses testified on behalf of the defense.

ARGUMENT

1. The fact that Indictment 71 did not specifically name Marilyn Tollefson as the woman transported on May 8, 1956, from Chicago, Illinois, to Minneapolis, Minnesota, is without practical significance in this case. The accompanying conspiracy indictment charged an agreement to accomplish such unlawful acts between various named dates. As overt acts, it alleged specifically that "[o]n or about May 8, 1956, defendants sent and caused to be sent monies to Marilyn Ann Tollefson for her transportation from Chicago, Illinois, to Minneapolis, Minnesota" (R. 22). It also alleged similar overt acts corresponding to Indictments 72 and 73, as well as naming Miss Tollefson in each of the other charges of overt acts, thirteen of which were named. As noted *supra*, page 5, upon hearing of the motions to dismiss the indictments, the United States Attorney stated that Miss Tollefson was the woman in question, and the court stated that, if a motion for bill of particulars were filed, the

naming of the woman would be required. No such motion was made.

The test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense charged and sufficiently apprises the defendant of the nature of the accusation, so that he may meet it and, after judgment, he may be able to plead the record and judgment in bar of further prosecution for the same offense. *Hagner* v. *United States,* 285 U.S. 427; *Bartell* v. *United States,* 227 U.S. 427, 431; *Rosen* v. *United States,* 161 U.S. 29; *Wong Tai* v. *United States,* 273 U.S. 77, 80–81. The language of the statute, repeated in this indictment, was fully descriptive of the offense charged. *United States* v. *Lewis,* 110 F. 2d 460, 462 (C.A. 7), certiorari denied, 310 U.S. 634. As the court of appeals said (Pet. 4a), the omission of the woman's name was of no more significance than the failure to allege that transportation was by common carrier in *Sun Chong Lee* v. *United States,* 125 F. 2d 95 (C.A. 9), or failure to allege the mode of transportation in *Mellor* v. *United States,* 160 F. 2d 757, 760 (C.A. 8), certiorari denied, 331 U.S. 848. All elements of the offense were clearly stated. If there was, in fact, any doubt as to the matter urged, the clear remedy was that suggested by the court and rejected by petitioners.

2. In support of his motion for a change of venue, petitioner Blumenfield called one Edwards, director of a local radio station, and asked him whether he was "familiar with the speed of the people around here and the reputation in which the defendant is

held", to which the witness responded, "I think so." No effort was made to show the number of people whom the witness had heard express opinions, the nature of such opinions, or how broad the areas from which these people were drawn. Under these circumstances, the court properly sustained an objection to the question. Permission was granted to renew the motion if it should appear upon the empaneling of the jury that prejudice existed (Mot. Tr. 290–297). This was in line with the view expressed in *United States* v. *Dioguardi*, 20 F.R.D. 33, 35 (S.D. N.Y.); cf. *United States* v. *Moran*, 236 F. 2d 361, 362 (C.A. 2), certiorari denied, 352 U.S. 909. The panel was drawn not only from the district surrounding Minneapolis, but also from the second division, in the southwestern part of the state (Jury Tr. 58, 212). Only two members of the panel were challenged for cause, which challenges were denied (Jury Tr. 130–131, 178–180). The ultimate disposition of the various charges indicates that the jury approached the case without prejudice.

3. Petitioner does not question the sufficiency of the evidence to establish that on May 8, 1956, Blumenfield induced Miss Tollefson to go by common carrier from the state of Illinois to the state of Minnesota for the purpose of having sexual relations with him. His contention is that the Mann Act "is aimed at panderers or proprietors of houses of prostitution who induce prostitutes to travel in interstate commerce so that they may profit from their illicit activities" (Pet. 23). This is no longer an open question, in light of *Caminetti* v. *United States*, 242 U.S. 470, 484–490. Such transportation for any immoral pur-

pose is forbidden under the language of the Act. See, also, *Cleveland* v. *United States*, 329 U.S. 14, 17–18.

4. The evidence amply sustained the charge of conspiracy. The proof of such charge must, of necessity, be largely by circumstantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80. Here, it was apparent that petitioners worked together constantly in handling matters arising out of the relationship between Miss Tollefson and Blumenfield.

The evidence was convincing that Perkins knew of Miss Tollefson's activities and her relation to Blumenfield. Early in their acquaintance, while she was living at the Mark Twain Hotel, he himself had relations with her, according to his own testimony (Tr. 738). Later, he advised her as to the kind of business she should go after (Tr. 357). During this early period he arranged, on behalf of Blumenfield, to take care of some bad checks she had written (Tr. 70–74). Soon thereafter, when she moved to New York, Blumenfield instructed her to contact Perkins when she needed money. There was abundant proof that she did so. While Perkins "guessed" that the money was his (Tr. 740), this was hardly credible, in view of Perkins' admittedly small income (Tr. 766, 770) and the obvious fact that she was Blumenfield's "girl friend." Miss Tollefson's memory was understandably indefinite as to many of the occasions as to which she testified. She believed, but was not sure, that Perkins sent her the money for the trip to Minneapolis in October or November, 1955, when she stayed at a hotel with Blumenfield. (This

particular trip, we note, was not made the subject of a substantive charge, a point which bears on the contention that the eventual acquittal of Perkins on all substantive charges necessarily was a disposition of the conspiracy charge, discussed *infra,* page 15). Also on this occasion, as pointed out *supra,* pages 6–7, Perkins told the hotel manager that Blumenfield would take care of the hotel bill, from which it is fairly inferable that Perkins was assisting in the arrangements for these meetings. He was regularly meeting Miss Tollefson when she flew in from Chicago and returning her to the airport when she left. His participation in the grand jury episode, discussed *infra,* pages 15–16, and the subsequent delivery to Miss Tollefson of the five hundred dollars she had requested from Blumenfield, showed his full awareness of the relationship between her and Blumenfield and his participation in arranging matters in connection therewith. Miss Tollefson's final trip to Minneapolis was in July, 1958 (Tr. 159–162), and she thought that she received money from Perkins one time after that (Tr. 163).

The jury acquitted both petitioners as to all substantive offenses except that charged to have occurred on May 8, 1956, which they seem to have regarded in a more serious light than the other, less offensive, incidents. There was no direct testimony as to Perkins' participation in arrangements for this particular trip, and the trial court set aside his conviction on this charge. However, this does not mean that the conspiracy conviction was thereby deprived of its validity. A substantive offense and conspiracy

to commit it are separate offenses. *Pinkerton* v. *United States,* 328 U.S. 640, 643–644. *Sealfon* v. *United States,* 332 U.S. 575, involving a question of *res judicata* where a prior acquittal of conspiracy necessarily determined adversely to the prosecution facts later relied upon to support conviction of a substantive offense, is inapposite. Consistency in the verdict, whether upon different counts or upon different indictments tried together, is not necessary. *Dunn* v. *United States,* 284 U.S. 390, 393; *United States* v. *Dotterweich,* 320 U.S. 277, 279. However, the verdict here was not necessarily inconsistent, as the jury could well have found that Perkins collaborated with Blumenfield in arranging for trips by Miss Tollefson other than those charged as substantive offenses.

5. The evidence relating to Miss Tollefson's testimony before the grand jury was properly admitted. This was originally admitted only as to petitioner Perkins. His successful effort to dissuade Miss Tollefson from following the Chicago lawyer's advice (to plead the Fifth Amendment and in no event to perjure herself) showed Perkins' understanding of the nature of the relationship between her and Blumenfield and the purpose of the various trips from Chicago to Minneapolis. When it was later shown that the matter was discussed in the presence of Blumenfield (who purportedly had originated the instructions), that Miss Tollefson told Blumenfield that she had followed his instructions, and that Blumenfield thereafter made further payments to Miss Tollefson, the evidence was properly admitted

against Blumenfield. Subornation of perjury tends to show conscious guilt. *United States* v. *Freundlich*, 95 F. 2d 376 (C.A. 2); *Wallace* v. *United States*, 243 Fed. 300, 308 (C.C.A. 7). The rule of *Krulewitch* v. *United States*, 336 U.S. 440, where there was no such adoption of the co-conspirator's previous statements, has no application. The evidence showed that Blumenfield accepted and approved the previous statements made out of his presence by Perkins.

6. The trial court was liberal in the latitude accorded the defense in the cross examination of Miss Tollefson. Petitioners' counsel questioned her in detail as to her past life and the practice of her profession. This included the naming of numerous men with whom she had been associated, the acts performed and full particulars as to the life she led. Miss Tollefson stated that she was a "full-fledged prostitute" (Tr. 216). The court had occasion at one point to comment on the frankness of her testimony (Tr. 192).

The offer of proof as to Hy Brody was that Miss Tollefson charged some bills to him while she was in Las Vegas; that he supported her over a long period of time, including the time covered by the indictments; and that he traveled with her interstate. The concluding portion of this offer, upon which reliance is now placed, stated that Miss Tollefson had left out part of the story as to him "in a deliberate attempt to shield Hy Brody, who is, on proof that we can establish, actually guilty of the very thing that she is charging against this defendant" (Tr. 303–305). Taking this statement in context, it is apparent that

its meaning was that Brody, too, was causing Miss Tollefson to be transported in interstate commerce for immoral purposes, not that he was guilty of the specific offenses charged by these indictments.

The court said that it would permit the defense to inquire regarding the relationship with Mr. Brody and the receipt of money from him during the period covered by the indictments, but would not permit going into detail as to the various episodes or their travels together (Tr. 309–310). Petitioners' counsel then questioned the witness quite extensively as to their relations and as to his lending her money when she was in difficulties in Las Vegas. There was not the slightest suggestion that he advanced money at any time to bring her from Chicago to Minneapolis—the gravamen of the various charges against petitioners (Tr. 331–340). Obviously he would have no motive to do so, since he was a Chicago businessman. Whether or not another person committed other offenses not charged does not affect petitioner's guilt of the offenses charged.

The offer of proof that Miss Tollefson, prior to the trial, had stayed at a local hotel and run up big bills which she was unable to pay, but which it was asserted she expected the government to pay (Tr. 324–325), was also properly rejected. It was conceded in the offer of proof that the government had not paid the bill, and it further appeared that thereafter Miss Tollefson had been placed in the local jail for a period of five weeks to await the trial of this case (R. 168).

Plainly, in these circumstances, there was no room for an inference that the witness was being influenced by favors.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JANUARY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961

LE COPY

Office-Supreme Court, U.S.
FILED
FEB 7 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 585

ISADORE BLUMENFIELD and MONTE PERKINS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

E. DAVID ROSEN,
310 Biscayne Building,
19 West Flager Street,
Miami, Florida,

THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
MCBRIDE, VON MOSCHZISKER
& BRADLEY,
2015 Land Title Building,
Philadelphia 10, Penna.,
Attorneys for Petitioner Blumenfield.

HENRY H. BANK,
Room 707—512 Nicollet Building,
Minneapolis, Minnesota,
Attorney for Petitioner Perkins.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

ISADORE BLUMENFIELD AND MONTE PERKINS,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

This Reply is mainly directed only to answering serious misrepresentations of the record in the Government's Brief.

I.

Under Questions Presented the Brief for the Government says:

> "3. Whether petitioner Blumenfield was properly convicted for violation of the Mann Act, although no motive of pecuniary gain was shown."

That is not petitioners' claim at all. They agree that unless and until *Caminetti v. United States*, 242 U. S. 470, is overruled the answer to such a question must be in the affirmative. Rather, petitioners' question is whether the immorality of a *customer's* sexual intercourse with a prostitute was the "immorality" contemplated by the Mann Act.

Petitioners' position is that it was not the intent of Congress to prosecute persons for felony where their dereliction involves interstate commerce under circumstances where the states do not punish such conduct even as misdemeanors when it occurs intrastate.

II.

The Government in its Statement (Brief, p. 5) would have it that petitioners only filed motions to dismiss the four substantive indictments and did not make such a motion in respect of the conspiracy indictment. This is incorrect. The motions were made in respect of all indictments. The pivotal objection was that the grand jury had not indicted petitioners either in the conspiracy or substantive indictments with respect to any particular named woman.

The Government's brief suggests, but does not directly say, that Marilyn Ann Tollefson was named in the conspiracy indictment as the person whom the defendants conspired to transport. This, however, is not so. No woman was named in the charging part of that indictment. The name of Marilyn Ann Tollefson only appears in respect of certain overt acts. It is obvious that any overt act need not be the commission of the substantive offense which is the object of the conspiracy but merely any act which even if innocent in itself was a step toward the accomplishment of such object.

The Government's Brief further says (p. 5): "During the hearing, it was urged that the substantive indictments were defective in failing to name the woman involved." In fact, as noted above this same charge was leveled by petitioners as to the conspiracy indictment also. It is true that the Court invited counsel to file a motion for bill of particulars and that no such motion was filed. It is petitioners' contention that failure to name the woman in the indictments found by the grand jury is not a defect which can be cured by a bill of particulars but instead constitutes failure to aver an essential element of the offense.

III.

In its summation of the evidence the Government's Brief conveys an entirely wrong impression by the simple expedient of ignoring the cross-examination. It is true that Tollefson testified that she left home at Blumenfield's suggestion and moved to the Mark Twain Hotel, registering under the name of Marilyn Cohn; but on cross-examination, she admitted facts which show this to be untrue. The Government also is telling only a half-truth when it says (Brief, p. 6) "At first she lived entirely on the money given to her by Blumenfield (Tr. 43). She testified that this was the beginning of her life as a prostitute (Tr. 37)." In fact, it was to avoid the improper suggestion that petitioners had *made* her a prostitute that much of the cross-examination went into details; but it is clear that before she ever met petitioner Blumenfield she had been a prostitute, and had indulged in sexual misconduct habitually with a number of men (Tr. 199-203).

IV.

The Government says (Brief, p. 6) following July, 1955 "there were numerous trips back to Minneapolis made at Blumenfield's request." There is not the slightest bit of evidence, direct or circumstantial, to justify this statement and it is noted that the Government's brief does not cite the transcript on this point.

V.

The Government's Brief (p. 7) continues in this Court to assert as fact the testimony of the prosecutrix even as to the indictments on which petitioners were acquitted. Surely, on this appeal, or in any court of the United States, subsequent to the acquittal, no such testimony can be treated as a fact nor can the Government be given the benefit of this testimony as if it were true since its truth would contradict the verdict of acquittal. This much is covered by the

Seventh Amendment of the Constitution. See also *Sealfon v. United States*, 332 U. S. 575. It must be kept in mind that the Government's narrative of testimony as to events that took place in 1957 commencing with the Government's brief (p. 8), had to do with matters which, in the light of the jury's acquittal of all offenses charged during that period are inadmissible here to support the verdicts both as to the conspiracy which in the light of the jury's finding ended on May 8, 1956 as well as the only substantive count upon which petitioners were convicted.

VI.

A further example of the liberties which the Government's brief takes with the testimony is shown by the statement (p. 9) "The following day he sent Perkins over with the amount requested, but required her to sign a promissory note for it (Tr. 148-151)." There is evidence that she signed a promissory note but no evidence whatever that the petitioner Blumenfield suggested it or required it or was given it.

ARGUMENT.

I.

The Government has misapprehended the reach of *Stirone v. United States*, 361 U. S. 212. In *Stirone*, this Court read the Sixth Amendment in the light of the Fifth Amendment and required not merely that the defendant be protected from *second* jeopardy but that his *first* jeopardy be limited to an offense specifically charged by the *grand jury* not by the court or the prosecutor.

II.

The Government would have it that petitioners, having called one witness, Edwards, a Director of a local Radio Station, to show community prejudice, failed to qualify him by showing the number of people whom he had heard express opinions as to the chance of a fair trial, the nature of such opinions or how broad the areas from which these people were drawn. A fair reading of the record shows that scores of witnesses had been subpoenaed and were present in court and that they covered radio stations, newspapers from every single area from which the jury would be drawn and the petitioner was prevented from showing the very facts which the Government now say he should have shown. The Government finds comfort in the statement (Brief, p. 12) "The ultimate disposition of the various charges indicates that the jury approached the case without prejudice." It indicates no such thing. Merely because the jury acquitted on three indictments does not mean that it was not prejudiced on the other two. Nothing whatever can be drawn from the fact the jury made this distinction.

III.

Again (Brief, p. 12) the Government paints petitioners' position as being merely an attack upon *Caminetti v.*

United States, 242 U. S. 470. Petitioners reiterate that that was not the reach of their argument. They contend instead that the immoral purpose proscribed by the Mann Act was not intended to accomplish conviction of a customer for the kind of immorality involved in the sexual relations between such customer and a prostitute.

IV.

The Government takes the position that the acquittal of Perkins by direction of the Court on the conspiracy charge does not affect his guilt of the substantive offense. It contends apparently that the doctrine of res judicata comes into play only on a second prosecution but the language of the Seventh Amendment requires that facts found by a jury be not reexamined by "any" court of the United States and does not restrict it to subsequent prosecutions. Unless all meaning is to be taken from the Seventh Amendment, a federal court on appeal must accept the verdict of acquittal on any indictment involved. The question presented is not as the Government would have it, whether the verdict need be consistent. It is conceded by petitioners that consistency in verdicts is not essential. But where the indictments for the substantive offenses result in acquittals, the matters involved in those charges cannot be assumed to have been true for the purpose of sustaining the conspiracy charges either by the trial judge on later motions or by any federal court on appeal no matter what evidence the Government has produced to support them.

The Government contends moreover that the verdicts were not necessarily inconsistent because the jury could have found Perkins collaborated with Blumenfield to arrange for immorality by Miss Tollefson other than those charged as substantive offenses. This may be true but in no event could it be true as to any date subsequent to May 8, 1956, for there was acquittal as to all such matters. Although the indictment charged the conspiracy was in

existence later the jury's verdicts on all subsequent proceedings on the substantive counts settle the matter for all courts.

V.

The Government's Brief (p. 16) contends that the statement made by counsel for petitioner that he wished to prove that one Hy Brody was "actually guilty of the very thing that she is charging against this defendant" meant, as the context showed, only that Brody *also* was guilty not that he was guilty *instead of* petitioner. This is a plain distortion of the offer of proof. It is clear as crystal that counsel was offering to show the latter.

The Government says (Brief, p. 17) in respect of Hy Brody that "There was not the slightest suggestion that he advanced money at any time to bring her from Chicago to Minneapolis—the gravamen of the various charges against petitioners." This is precisely what petitioner *did* offer to show if permitted, viz., that Tollefson came to Minneapolis with money furnished by Brody. There was, of course, no suggestion that he was interested in her coming to Minneapolis for immoral purposes since he himself did not accompany her to Minneapolis. That does not detract from this aspect of the proffered proof that she used money to come to Minneapolis that she got from Brody and not from petitioners.

VI.

The Government suggests that Tollefson was an innocent young girl at the time she met petitioner Blumenfield; but the record shows otherwise. She had been married to a man named Crow, traveled in a sales crew, had relations with the boss who was not her husband (Tr. 199), had relations in Patterson with one Longie Zwillman, both naturally and unnaturally and lived with another man named

Niek Caruso. All this while she was married to Crow whom she hadn't seen for years and long before she ever met Blumenfield (Tr. 199-203).

Respectfully submitted,

THOMAS D. MCBRIDE,
MICHAEL VON MOSCHZISKER,
MCBRIDE, VON MOSCHZISKER
& BRADLEY,
E. DAVID ROSEN,
Attorneys for Petitioner
Isadore Blumenfield.

HENRY H. BANK,
Attorney for Petitioner
Monte Perkins.